INDIANA BUSINESS LAW SURVEY COMMISSION

OFFICIAL COMMENTS TO THE

INDIANA BUSINESS CORPORATIONS LAW

INDIANA CODE TITLE 23, ARTICLE 1

Released for Publication May 25, 2007

23-1-17-2 Official comments

The Commission recommended including the RMA's specific "reservation of powers" as preferable to relying solely on the general "reservation of powers" provisions contained in IC 1-1-5-1 & -2. *See also* Official Comment to IC 23-1-17-3(a).

23-1-17-3 Official comments

(a) Subsection (a) is patterned after RMA § 17.01, which reads, "This Act applies to all domestic corporations in existence on its effective date that were incorporated under any general statute of this state providing for incorporation of corporations for profit if power to amend or repeal the statute under which the corporation was incorporated was reserved."

Recognizing the transitional problems that would result if the BCL had immediate mandatory application, the Commission recommended a transitional period of sixteen months (April 1986 to August 1987), during which domestic corporations, as well as foreign corporations transacting business in Indiana, could become familiar with the new statute before they became automatically subject to and governed by its provisions on August 1, 1987.

In addition, IND. P.L. 149-1986, § 66 (not codified in the BCL) establishes other transitional rules generally designed to preserve the validity of corporate action taken prior to August 1, 1987 under statutes (principally the GCA) repealed as part of the legislation enacting the BCL. Most important, IND. P.L. 149-1986, § 66(a)(1) provides that the repeal of any statute by the legislation enacting the BCL (except for penalty provisions of some repealed statutes, *see* IND. P.L. 149-1986, § 66(b)) does not affect

... the operation of the statute or any action taken under it before its repeal, including (without limitation) the continuing validity of a corporation's articles of incorporation and bylaws, indemnification provisions for directors, officers, employees, and agents, resolutions of the board of directors and shareholders, and corporate name ... to the same extent that any of these would have been valid had the statute not been repealed.

The Commission recommended this transitional provision so that enactment of the BCL and the concomitant repeal of the GCA would not cast doubt on the continuing validity of corporate documents and actions taken under prior law, a decision that will have practical implications for many Indiana corporations well into the future.

For example, under the BCL a greater or lesser quorum requirement for shareholder voting than the majority requirement set by IC 23-1-30-6(a) must be set forth in a corporation's articles of incorporation. IC 23-1-30-6(a) & -8. Under the GCA, however, either the articles or the bylaws could establish deviations from the GCA's shareholder quorum rule. IC 23-1-2-9(g) (repealed 1986). The transitional rule of IND. P.L. 149-1986, § 66(a)(1) will preserve the continued validity of a bylaw provision setting a differing quorum requirement that was adopted under the authority of IC 23-1-2-9(g), notwithstanding the repeal of the GCA. To take another example, the BCL's requirements for share certificates differ somewhat from the comparable provisions of the GCA. *Compare I*C 23-1-26-6 *with* IC 23-1-2-6(f). Because of IND. P.L. 149-1986, § 66(a)(1), a corporation need not be concerned that existing share certificates that comply with IC 23-1-2-6(f) but not with IC 23-1-26-6 have now been rendered invalid (though certificates issued hereafter should conform to the rules established by the BCL).

However, once a corporation becomes subject to the BCL, IND. P.L. 149-1986, § 66(a) does *not* permit it to adopt *new* articles of incorporation or bylaw provisions, or to take other corporate action *in the future* (except pursuant to an existing, "grandfathered" authorization provision), that was authorized by the GCA but is not authorized by the BCL. In other words, except for the preservation of the continuing validity of existing articles and bylaw provisions and other existing corporate authorizations or actions, IND. P.L. 149-1986, § 66(a) does not allow a corporation to "choose" in the future whether it will be governed by the GCA or the BCL. *See also* IC 23-1-17-3(e) and Official Comment.

Certain other transitional rules of IND. P.L. 149-1986, § 66 are discussed in the Official Comments to BCL sections dealing with the subject matter of the rule involved.

After July 31, 1987, all domestic corporations then in existence or formed thereafter, and (with certain exceptions) all foreign corporations then or thereafter authorized to do business in Indiana, became subject to the BCL. (The exceptions are foreign banking, surety, trust, safe deposit, railroad, insurance, and building and loan corporations, which do not need to obtain a certificate of authority from the Secretary of State under the BCL to transact business in Indiana because they are governed by special corporation statutes. *See* IC 23-1-49-1.) The general rule that all corporations would be subject to the BCL follows the RMA position that the RMA should ultimately be made fully applicable to all existing corporations as well as to all new corporations formed after the effective date of the statute, and that the repeal of existing corporations statutes should accompany the enactment of the new act. MODEL BUSINESS CORP. ACT ANN. 1797 (3d ed. 1985). It differs from the GCA approach, which gave domestic corporations incorporated prior to 1929 the option to accept the terms and provisions of the 1929 GCA. Thus, while the GCA repealed all other for-profit corporation acts in effect prior thereto, the repeal

... only [went] so far as to prevent the incorporation of new corporations under those acts, but [continued] all such acts to govern the corporations incorporated under such acts before March 16, 1929, being the date upon which [T]he Indiana General Corporation Act of 1929 was approved. Domestic for-profit corporations incorporated before March 16, 1929 [were] not required to come under the 1929 Act and [could] continue their corporate existence under the act under which they were incorporated, but such corporations [were] granted the privilege and opportunity by § 46 of the 1929 Act voluntarily to accept the 1929 Act and thus enjoy the exercise of all its provisions. No precedent [existed] for this provision.

F.E. SCHORTEMEIER, INDIANA CORPORATION LAW 148 (1952).

In comparing the RMA and GCA approaches, the Commission concluded that, given the number of existing Indiana corporations (estimated at the time to be approximately 200,000), it would be unduly cumbersome and administratively unmanageable to require the filing of articles of acceptance by each corporation desiring to be governed by the BCL. Automatic applicability to all existing corporations was also deemed preferable given the general consensus of the Commission that a single, uniform corporation statute was desirable, and that corporations would find the provisions of the BCL advantageous, beneficial and consistent with the realities of modern corporate practice.

The language of RMA § 17.01 - qualifying the application of the new act to existing corporations only "if power to amend or repeal the statute under which the corporation was incorporated was reserved" - was deleted because it is solely instructional and substantively superfluous. If power to amend or repeal the enabling corporate legislation was in fact reserved, recitation of the need for such reservation is unnecessary. In considering the proposed deletion of this language, however, the Commission discovered that Indiana's "reserved power" clause applicable to the GCA, found in IC 23-1-12-5 (repealed 1986), had ostensibly been repealed, effective July 1, 1978, by IND. P.L. 2-1978, § 2325. Without a "reserved power" clause, there was some question whether the BCL could be made mandatorily applicable to corporations formed under the GCA after July 1, 1978. It was learned, however, that the seeming repeal of IC 23-1-12-5's "reserved powers" clause reflected a clerical error made in the preparation and printing of IND. P.L. 2-1978, § 2325. To rectify the situation, the General Assembly enacted IND. CODE § 23-1-12-5.1, which restates the "reserved power" clause applicable to the GCA and explains:

The purpose of the general assembly in enacting this section is to correct an error that was made in the preparation of Acts 1978, P.L. 2, § 2325. The general assembly finds and declares that the inclusion of IC 23-1-12-5 in the list of provisions to be repealed by Acts 1978, P.L. 2 was a clerical error, and that the general assembly did not intend to repeal IC 23-1-12-5 when it enacted Acts 1978, P.L. 2.

IC 23-1-12-5.1(b). This section was made effective retroactive to July 1, 1978.

(b) The Commission recognized that for various reasons, domestic corporations in existence prior to the August 1, 1987 mandatory application date might want to avail themselves of the rights, privileges and immunities afforded by the BCL before that date. Therefore, subsection (b)'s "opt-in" procedure was added to make the BCL's provisions available to electing corporations as early as April 1, 1986. The opt-in procedure required only a board resolution, without need for shareholder approval. The resolution had to specify a date on which the BCL would be applicable to the corporation, and then had to be filed with the Secretary of State before that date.

Once a domestic corporation took advantage of the early election procedure, the corporation was, on the date specified in the corporate resolution, governed by all provisions of the BCL except IC 23-1-18-3 (repealed 1986) (filing fees), IC 23-1-21 (repealed 1986) (incorporation) and IC 23-1-53-3 (repealed 1986) (annual reports). These provisions did not apply to any corporation before August 1, 1987, both to give the Secretary of State's office a reasonable period of time in which to adjust its prescribed corporate forms and internal office procedures to the BCL, and to minimize the need for parallel administration of two corporation statutes during the transitional period. During that period, prior law governing these matters - IC 23-1-3 (incorporation), IC 23-1-8 (annual reports) and IC 23-3-2 (filing fees) - continued in effect. (Hence, a corporation organized during the transitional period that wished to be governed immediately by the BCL was required to incorporate under the GCA and then opt-in to the BCL.)

(c) Subsection (c) specified that the GCA would not apply to corporations that elected early governance by the BCL. In 1987, the subsection was amended to provide that such corporations would also not be subject to IC 23-3-9 (a temporary statute, which expired August 1, 1987, whose substantive provisions were essentially identical to the Business Combinations Chapter of the BCL, IC 23-1-43).

(d) Subsection (d) was added in 1987, to provide that corporations that elected early governance by the BCL would be subject to IC 6-8.1-10-9 (repealed 1986) and IC 22-4-32-22 (repealed 1986) as of the date they became subject to the BCL. These sections were added in 1987 to the

Indiana Revenue Code and the Indiana Employment Security Act, respectively, and replace prior earlier statutory provisions dealing with notices to the Indiana Department of Revenue and the Indiana Employment Security Division, respectively, on corporate dissolution. *See* IC 23-1-45-2(f) and Official Comment.

(e) Subsection (e) was added in 1987 to clarify that once a corporation became subject to the BCL, all references in its articles of incorporation to the GCA are automatically deemed references to the BCL, unless otherwise determined by resolution [of] the board of directors. The subsection makes it unnecessary for a corporation to amend its articles of incorporation simply to change references to the GCA to the BCL. If, however, a corporation specifically wishes to retain a GCA reference, it may do so by board resolution (without the need for shareholder approval). The resolution must then be filed with the Secretary of State, to avoid confusion on the public records as to the meaning of the corporation's articles of incorporation.

Subsection (e) should be read in conjunction with IND. P.L. 149-1986, § 66(a), which provides that the repeal of any statute by the legislation enacting the BCL (except for penalty provisions of some repealed statutes, *see* IND. P.L. 149-1986, § 66(b)) does not affect the operation of the statute before its repeal, including the continuing validity of articles of incorporation and bylaw provisions and other corporate action taken under the repealed statute. IND. P.L. 149-1986, § 66(a) thus permits a corporation to continue to operate under an articles or bylaws provision that existed when the corporation became subject to the BCL and was authorized by the GCA, even if the BCL does not authorize the provision in question. *See* IC 23-1-17-3(a) and Official Comment. Under subsection (e), if such a "grandfathered" articles of incorporation provision includes a specific reference to the GCA, the corporation's board of directors may adopt and file a resolution stating that the subsection's general rule - *i.e.*, that references in the articles to the GCA now automatically refer to the BCL - does not apply to that "grandfathered" provision.

However (as discussed in the Official Comment to IC 23-1-17-3(a)), once a corporation becomes subject to the BCL, neither subsection (e) nor IND. P.L. 149-1986, § 66(a) permits it to adopt *new* articles of incorporation or bylaw provisions, or to take other corporate action *in the future* (except pursuant to an existing, "grandfathered" authorization provision), that was authorized by the GCA but is not authorized by the BCL. In other words, except for preservation of the continuing validity of existing articles and bylaw provisions and other existing corporate authorizations or actions, IND. P.L. 149-1986, § 66(a) does not, either by itself or in conjunction with subsection (e), allow a corporation to "choose" in the future whether it will be governed by the GCA or the BCL.

Subsection (e)'s provision authorizing preservation of GCA references by board resolution can also be useful in one other context. In some cases, a corporation may wish to preserve a particular definition or procedure, established by a reference in the corporation's articles of incorporation to the GCA or one of its statutory provisions, involving an area in which the BCL gives corporations freedom to adopt articles of incorporation provisions of their choice. In these instances, subsection (e)'s board resolution procedure gives a corporation a simple, shorthand way of preserving a GCA definition or procedure that it still wishes to follow.

23-1-17-5 Official comments

This section has no RMA counterpart. Because of the scope and importance of the BCL and its significant departures from both the RMA and the GCA, the Commission believed that Official Comments would be helpful to the bench and the bar in determining the underlying reasons, purposes and policies of the BCL, and as a guide in its construction and application. In this section, the General Assembly specifically authorized and accorded "official" status to these Official Comments. In addition, these BCL Official Comments were formally "recognized as an official guide to the construction and application" of the BCL by a House Concurrent Resolution adopted in the 1988 session of the Indiana General Assembly. IND. H. CON. RES. 101 1988.

Because the BCL is based primarily on the RMA, the Commission hereby adopts and incorporates by reference, as part of its Official Comments to the BCL, the "Official Comments" to the 1984 version of the RMA adopted and approved by the Committee on Corporate Laws of the Corporation, Banking and Business Law Section of the American Bar Association. As noted in the Introduction to the BCL Official Comments, references herein to "Official Comments" mean these Official Comments prepared by the Commission; the Official Comments to the RMA are called "RMA Official Comments," and are usually cited by reference to the section of the RMA to which they relate.

To the extent RMA provisions have been adopted in the BCL, the RMA Official Comments should be read together with the BCL Official Comments printed here. However, as also noted in the Introduction to the BCL Official Comments, where statements in the two sets of Comments are inconsistent the BCL Official Comments control, even if the BCL statutory provision being discussed is substantively identical to the corresponding RMA provision.

From time to time, the Business (formerly Corporate) Law Survey Commission ("Commission") revises the commentary to reflect amendments to the BCL. These revisions are designed to ensure BCL commentary reflects the current state of the BCL.

23-1-18-1 Official comments

Subsection (f)

The phrase "or by any of its officers" of subsection (f)(1) replaces the RMA language "by its president, or by another of its officers" because the phrase "any of its officers" includes a corporation's president.

Subsections (g) and (h)

Subsections (g)(2) and (h) were added to allow an attorney in fact to sign documents filed under this article for an officer. The power of attorney need not be notarized, but must be maintained with the corporate records.

Subsection (k)

The phrase "and any franchise tax, license fee, or penalty required by this Act or other law," which appears at the end of this subsection in the RMA, was deleted since the BCL does not impose franchise taxes and any applicable license fees are generally not collected by the Secretary of State. Further, no monetary penalty imposed by the BCL or other law is collectible by the Secretary of State.

Subsection (m)

Subsection (m) allows electronic filing of documents with the Secretary of State.

23-1-18-3 Official comments

Subsection (a)

Regardless of a corporation's decision under IC 23-1-17-3(b) to elect early coverage of the BCL, the fees prescribed in this section were not applicable until the BCL's mandatory application date of August 1, 1987. Prior to that date, the filing fees set out in IC 23-3-2 applied.

The new fee schedule eliminates both (a) the per share fee assessed under the GCA for authorization or increase of shares for domestic corporations and (b) calculation of the "Indiana shares" formula for foreign corporations. The Commission's review of other states' fee schedules revealed that Indiana was one of the few states maintaining the per share fee, which imposed substantial fees on corporations engaging in major transactions such as public offerings. Given the absence of per share fees in most other States, the Commission believed that preserving such potentially large filing fees discouraged corporations from remaining domesticated in Indiana when they went public.

The Commission also learned, however, that Indiana's basic filing fees were lower than in most other States, and that there had not been a general increase in corporate filing fees in Indiana since 1971. The Commission believed that these facts, coupled with the elimination of per share fees, justified a modest across-the-board fee increase in 1985. These fees are reviewed periodically and updated as necessary.

In 1988, the "catch-all" fee provision (formerly subdivision (26), now subsection (28) was amended to clarify (1) that the Secretary of State has authority routinely to issue other certificates without additional fee (such as a "certificate of incorporation" upon the filing of articles of incorporation), pursuant to internal procedures that the Secretary of State may establish and modify in his discretion; (2) that the "other document[s] required or permitted to be filed" can include requests for a "certification certificate" and other special certificates for a $30.00 fee (except for any certificates issued by the Secretary of State without charge under any internal procedures that may be in effect at a given time); and (3) that a $30.00 fee is also charged for a request, under IC 23-1-18-9(b)(7), for "other facts of record" in the Secretary of State's office.

A "certification certificate" is a separate certificate, normally issued only if requested, certifying the authenticity of a copy of a document on file. Under subsection (d), certification is normally done by affixing a certification stamp to the reverse side of the last page of the document being certified. But a party may also request a separate "certificate" certifying the authenticity of the copy, which will be issued for a separate $30.00 fee. The 1988 amendments also amended subsection (d) to clarify that certification is normally done by affixing a certification stamp and IC 23-1-18-8 to clarify that either a certification certificate or stamp constitutes "conclusive evidence" that a document is on file.

Other special certificates would include any certificate a person may request to verify that a particular fact exists of record or that a particular document has been filed. For example, a person who wants a certificate that articles of merger were filed on a given date may request such a certificate for the $30.00 fee specified in subsection (a)(28) without requesting (under subsection (d)) a certified copy of the articles of merger themselves. Another example would be a certificate that, after due and diligent search of the records, a given corporation does not exist or a given filing has not been made.

A request for "other facts of record under section 9(b)(7) of this chapter" typically arises when a party applies for a so-called "long form" certificate of existence or authorization--i.e., one that seeks, in addition to the items listed in IC 23-1-18-9(b)(1)-(6), every filing on record for a given corporation. Imposition of the $30.00 fee is not limited, though, to situations where a party requests all other facts of record: A request for any record facts beyond those listed in subdivisions (1) through (6) of IC 23-1- 18-9(b) is subject to the $30.00 fee. Under subdivision (27), however, the fee for applications for a certificate of existence or authorization that do not request any "other facts of record" is $15.00.

Though the RMA Official Comments indicate that the RMA is intended to eliminate "certificates of incorporation and similar documents," see MODEL BUSINESS CORP. ACT ANN. § 1.25(b) (3d ed. 1985), the authority to issue such certificates (either routinely pursuant to internal procedures of the Secretary of State's office, or upon request and for an additional fee) permits the Secretary of State to respond to the prevailing expectations and reasonable requests of the corporate and legal communities at any given time. Under IC 23-1-18-8, however, "conclusive evidence" that a document is on file with the Secretary of State requires that a copy of the document be certified with either a certification certificate or stamp.

Subsection (c)

In addition to minor stylistic changes, the second sentence of the corresponding RMA subsection was amended to specify "the nonprevailing party" as the entity from which the service of process fee could be recovered.

Subsection (d)

The increase in fees for copying and certifications was deemed justified to cover the increased costs of providing such services since the 1971 adoption of the GCA's fee provisions for these services.

In 1988, subsection (d) was amended to reflect that certification by the Secretary of State is normally done simply by placing an official certification stamp on the reverse side of the last page of the document. The 1988 amendments to subsection (a)(26) (currently (a)(28)) clarify, however, that a party may also request (for an additional $30.00 fee) a separate certification certificate; and the 1988 amendments to IC 23-1-18-8 clarify that either form of certification constitutes "conclusive evidence" that the original document is on file.

23-1-18-6 Official comments

(a) As discussed in the RMA Official Comments, the Secretary of State's filing responsibilities are ministerial, limited to determining whether a document complies with the act's requirements for filing rather than making a more general finding that the document otherwise "conforms to the law." *See* MODEL BUSINESS CORP. ACT ANN. § 1.25 (3d ed. 1985). The GCA, by contrast, included a "conforms to law" finding by the Secretary of State as a condition to his filing of a variety of corporate documents. *See, e.g.*, IC 23-1-2-6(b) (repealed 1986) (resolutions of the board of directors determining the terms of a class or series of shares); IC 23-1-3-3 (repealed 1986) (articles of incorporation); IC 23-1-4-6 (repealed 1986) (amendments to articles of incorporation); IC 23-1-5-2 (repealed 1986) (articles of merger).

(b) The RMA Official Comments to this subsection state that it is intended to eliminate "certificates of incorporation and similar documents." *See* MODEL BUSINESS CORP. ACT ANN. § 1.25(b) (3d ed. 1985). The BCL, however, contemplates that the Secretary of State may issue such certificates (either routinely pursuant to internal procedures of his office, or upon request and for an additional fee). This permits the Secretary of State to respond to the prevailing expectations and reasonable requests of the corporate and legal communities at any given time. See IC 23-1-18-3(a) and Official Comment. Under IC 23-1-18-8, however, "conclusive evidence" that a document is on file with the Secretary of State requires that a copy of the document be certified with either a certification certificate or stamp.

(c) Subsection (c) in the RMA gives the Secretary of State five days to return a document refused for filing. The GCA, in IC 23-1-12-3 (repealed 1986), gave the Secretary of State ten days to give notice of disapproval of any document and the reasons therefor. The Commission recognized that in the vast majority of cases, the Secretary of State's office makes its determination as to a document's compliance with statutory requirements within five days or less, and that there is a continuing need for such rapid review. In some circumstances, however, additional time may be needed. Accordingly, the Commission recommended preserving the ten-day rule of prior law.

23-1-18-8 Official comments

This section is essentially identical to the corresponding RMA provision, but was amended in 1988 to reflect that either the Secretary of State's normal certification stamp or a separate certification certificate is "conclusive evidence" that a document is on file. *See* IC 23-1-18-3(a) & (c) and Official Comments.

Unlike the parallel GCA provision (IC 23-1-12-1) (repealed 1986), this section does not provide that the certificate is *prima facie* evidence of the facts appearing in the certificate. This change is consistent with the ministerial nature of the Secretary of State's duties under the BCL and the RMA.

23-1-19-1 Official comments

In general, the BCL contemplates a far more "ministerial" function for the Secretary of State than did the GCA. For example, under the BCL the Secretary of State has the power and duty to determine if a document submitted for filing complies with the BCL's requirements for filing of documents, but has no power or duty to make any general finding that the document otherwise "conforms to law." *See* IC 23-1-18-6(a) and Official Comment.

23-1-20-7 Official comments

Subsection (a)

Because the Commission considered the original RMA provision ambiguous as to whether a "transfer" of corporate indebtedness constituted a "distribution," the word "transfer" was added to clarify that a "distribution" includes not only the incurrence but also the transfer of indebtedness to or for the benefit of a shareholder. The Commission also recommended adding a cross reference to IC 23-1-28, the chapter that sets forth the statutory standards governing distributions.

Subsection (b)

Subsection (b)(1) was added to clarify that compensation for services or reasonable payments under a retirement or benefit program would not be considered a distribution under IC 23-1-28. Subsection (b)(2) was added to clarify that a bona fide guaranty by a corporation for the benefit of its shareholders (including corporate shareholders (*e.g.* a subsidiary guaranty)) would not be considered a distribution under IC 23-1-28. As clarified by the last sentence of subsection (b), it was not the intent of this provision to imply that any payment or performance not falling under the two situations described in subsection (b) would automatically be deemed a "distribution."

23-1-21-7 Official comments

(a) The Commission deleted RMA language in subsection (a) making emergency bylaws subject to amendment or repeal by the shareholders. This change is consistent with the changes made in chapter 39 of the BCL. *See* IC 23-1-39-1 & -3 and accompanying Official Comments.

(d) The Commission also believed that the RMA definition of "emergency" - *i.e.,* the inability of the quorum of the board of directors to assemble because of some "catastrophic" event - was too restrictive. Hence, the BCL uses the term "extraordinary" event, defined as an event that "prevents a quorum of the corporation's directors from assembling in time to deal with the business for which the meeting has been or is to be called."

The BCL's threshold for implementation of emergency bylaws is much lower than that contemplated by the RMA's "catastrophic" event concept, illustrated in the RMA Official Comments by the examples of an airline crash or fire. *See* MODEL BUSINESS CORP. ACT ANN. § 2.07 (3d ed. 1985). Under the BCL, by contrast, an "extraordinary" event may include such matters as a significant assets sale requiring board approval, offered to the corporation when a majority of its directors are out of the country and cannot be assembled before the time limits of the offer expire. Precisely what will constitute an "extraordinary" event will depend on individual circumstances, including the particular management practices of a corporation. Further, because emergency bylaws are to be adopted in advance, such bylaws can define or specify particular events that are "extraordinary" for a given corporation.

23-1-22-3 Official comments

This section should be read in conjunction with IC 23-1-21-7, which authorizes corporations to adopt emergency bylaws. The limited emergency powers granted in this section, however, are available to every corporation, regardless whether it has adopted emergency bylaws under IC 23-1-21-7.

(d) As in IC 23-1-21-7(d) (defining an "emergency" for purposes of emergency bylaws), the Commission again believed that the RMA definition of "emergency" (*i.e.,* the inability of the quorum of the board of directors to assemble because of some "catastrophic" event) was too restrictive. Hence, this section also uses instead the term "extraordinary" event, defined as an event that "prevents a quorum of the corporation's directors from assembling in time to deal with the business for which the meeting has been or is to be called."

As with the BCL's emergency bylaw provisions, subsection (d)'s threshold for implementation of emergency powers provisions is much lower than that contemplated by the RMA's "catastrophic" event concept, thereby making the provisions more useful in practice. For a further comparison of the BCL and RMA standards, *see* IC 23-1-21-7 and accompanying Official Comment.

23-1-22-4 Official comments

(a) This section, which has no RMA or GCA counterpart, expressly authorizes Indiana corporations to adopt procedures by which they regulate change-of-control transactions. Although the express authorization is new, corporate authority to adopt change-of-control procedures - such as shareholder "rights plans," or "fair price" provisions - has routinely been found in general statutory corporate powers. *See, e.g., Moran v. Household International, Inc.*, 500 A.2d 1346 (Del. 1985). The purposes of section 4 are (a) to clarify and make express corporate authority in this increasingly important area, (b) to establish a statutory definition of "control" as a threshold for the transactions to which such procedures may apply, and (c) to specify the means by which such procedures may be adopted.

Because this section simply authorizes, but does not require, private corporate adoption of change-of-control procedures, both the section and any procedures adopted under it should be immune from the charges of unconstitutionality frequently leveled at state statutes directly regulating change-of-control transactions. At least before the United States Supreme Court's decision in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987) (upholding the constitutionality of the BCL's Control Share Acquisitions Chapter, IC 23-1-42), it was commonly claimed (with considerable success in the lower Federal courts) that state change-of-control statutes (a) conflicted with the Williams Act amendments to the Securities Exchange Act of 1934, 15 U.S.C. § § 78m(d)(e), 79(d)-(f), and were therefore pre-empted under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, and (b) violated the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3.

Even before the Supreme Court's decision in *CTS*, however, the courts had rejected constitutional challenges to private corporate actions, taken under general statutory corporate powers provisions, that might affect change-of-control transactions. Thus, in *Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1, 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), the Second Circuit held that the Supreme Court's Commerce Clause analysis in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (a pre-*CTS* decision striking down an Illinois change-of-control statute), was "a rationale inapplicable to the present dispute which involves private [corporate] acts." The Delaware Supreme Court reached the same result in *Moran v. Household International, Inc.*, 500 A.2d 1346, 1353 (Del. 1985), where a general corporate powers provision was claimed to be unconstitutional if it authorized adoption of a shareholders "rights plan:"

The fact that directors of a corporation act pursuant to a state statute [in adopting such a plan] provides an insufficient nexus to the state for there to be state action which may violate the Commerce Clause or the Supremacy Clause.

Although the United States Supreme Court found it unnecessary to address the "private action" argument in *CTS, see* 481 U.S. at 94 n.14 (1987), the holdings in *Data Probe* and *Moran* are consistent with numerous Supreme Court cases addressing what constitutes "state action" under the Fourteenth Amendment. These cases have consistently held that action taken under a general statutory authorization will not constitute "state action" subject to successful Fourteenth Amendment challenge unless that statute "orders" the action in question. *See, e.g., Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164-65 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974). Significantly, *Flagg Bros.* also rejected any application to "the field of private commercial transactions" of the doctrine that private acts can (in such contexts, for example, as election laws) be considered "state action" because the State has delegated authority to private parties in an area that it has the sovereign power to regulate directly. *See* 436 U.S. at 163.

In light of this authority, the Commission believes that section 4's authorization of private corporate change-of-control procedures should not be subject to successful constitutional challenge.

(b) Subsection (b) establishes differing minimal thresholds of "control" for purposes of the procedures that may be adopted under this section. For corporations with 100 or more shareholders, "control" means the beneficial ownership, or the direct or indirect power to direct the voting, of no less than 10% of the corporation's voting shares. For corporations with fewer than 100 shareholders, the corresponding percentage is 50%. This difference reflects the fact that in corporations where shareholdings are dispersed among many shareholders, control of 10% of the voting shares can constitute a significant level of concentration of voting power, with potential consequences for the future of the corporation and the rights of other shareholders that the corporation may wish to regulate by its own change-of-control procedure. In corporations where shareholdings are less dispersed, literal control - 50% - is a more appropriate threshold.

Subsection (b)'s thresholds for "control" are statutory minimums. Thus, a corporation with 100 or more shareholders is free to establish a change-of-control procedure based on 20%, 33% or any other percentage of ownership higher than 10%, but may not establish such a procedure based on 5% or any other percentage of ownership lower than 10%. A corporation with fewer than 100 shareholders may not establish a procedure based on any percentage of ownership lower than 50%.

(c) Subsection (c) permits adoption of a change-of-control procedure either in original articles of incorporation or bylaws, by amending the articles or by amending the bylaws. Subdivision (3) makes clear that the last of these options is available notwithstanding the fact that the BCL or the corporation's articles of incorporation might otherwise require a shareholder vote for the adoption or implementation of all or any portion of the procedure. Thus, the directors may establish by bylaw amendment a change-of-control procedure that includes, for example, mandatory redemption provisions, even though such provisions might normally require shareholder approval for adoption.

The fact that subsection (c) vests potentially broad authority in a board of directors to adopt change-of-control procedures does not mean, however, that any exercise of that authority will necessarily be proper. Directors' decisions in this area, like any other, remain subject to the standards of conduct set forth in IC 23-1-35. Nor does subsection (c) change the "business judgment" rule used by the courts in evaluating challenges to director action (just as IC 23-1-35's standards of conduct do not, as the RMA Official Comments reveal, *see* MODEL BUSINESS CORP. ACT ANN. § 8.30 (3d ed. 1985), try to codify or address the "business judgment" rule). Also, certain corporations may be subject to Securities and Exchange Commission or stock exchange rules that may also limit either the permissibility of, or the method of adoption for, particular kinds of change-of-control procedures, notwithstanding that such procedures are authorized under this section as a matter of state law.

23-1-23-1 Official comments

Subsection (a)(1)

Consistent with other jurisdictions, the BCL permits a corporation to use the words "company," "limited" or the abbreviations therefor as a sufficient indication of corporate status, in addition to the words "corporation," "incorporation" or their abbreviations, which were authorized by the GCA. *See* IC 23-1-2-4(a) (repealed 1986). A Commission survey revealed that approximately 45 other states permit use of "company" or "limited" as a sufficient indication of corporate status.

Subsection (a)(2)

The introductory phrase "except as provided in subsection (e)" was added to subsection (a)(2) because of the decision to retain prior Indiana law relevant to the "bank holding company" exception to this subsection. *See* IC 23-1-23-1(e) and Official Comment.

Subsection (b)

Subsection (b) parallels the GCA provision, IC 23-1-2-4 (repealed 1986), that required corporate names to be distinguishable from those of existing domestic, foreign and not-for-profit corporations or that were subject to name reservations. In 2002, subsection (b)(1) was amended to require corporate names to also be distinguishable from those of other business entities validly existing or authorized to transact business in the State of Indiana. Use of fictitious or assumed business names, however, is controlled by IC 23-15-1, which provides, as to corporations, for the filing of a certificate of assumed name in the office of the recorder of each county in which a place of business or office of the corporation is situated. In addition, a corporation must file with the Secretary of State a copy of the certificate certified by each county recorder. This statute is a notice-type provision and does not purport to grant exclusive rights to an assumed name.

Accordingly, the RMA language in this subsection dealing with fictitious names was deleted to conform with the non-exclusivity of use contemplated by IC 23-15-1.

Subsection (c)

Subsection (c), as initially enacted, adopted the RMA rule that an applicant corporation could use a name not distinguishable from that of another corporation only if (a) the other corporation consented and agreed to change its name to one that was distinguishable or (b) the applicant had obtained a judgment establishing its right to use the name. The GCA required only that the other corporation consent in writing to the applicant's use of a non-distinguishable name, without requiring that the consenting corporation also agree to change its name. *See* IC 23-1-2-4 (repealed 1986). In 1988, subsection (c)(1) was amended to return to the GCA rule. The Commission believed that the GCA rule had not in practice caused serious "confusion" or similar problems, and that the simple "consent" procedure was often useful to corporations and practitioners (e.g., in the parent-subsidiary and merger and acquisition contexts).

Subsection (e)

Subsection (e), which has no RMA counterpart, grants for bank holding companies a limited exception to the rule, contained in the RMA, the BCL and the GCA, that a corporate name may not contain language stating or implying a purpose other than that permitted by the corporation statute. This exception was first granted in a 1985 amendment to the GCA. *See* IC 23-1-2-4(e) (repealed 1986).

The Commission believed retention of this 1985 GCA provision was appropriate given the growing use of bank holding companies and the common practice of using the word "bank" or a derivation thereof in the names of such companies. The limitation that such a company may not hold itself out to the public as affording or performing banking services should provide adequate protection against potential abuse of the provision.

Subsection (f)

The introductory phrase, "Except as provided in IC 23-1-49-6," was added to cross-reference the section of the BCL that governs the use of a fictitious name by a foreign corporation transacting business in Indiana whose real name is not available in this State. Use of fictitious or assumed business names is generally controlled by IC 23-15-1, a "notice" statute that does not purport to grant exclusive rights to an assumed name. See IC 23-1-23-1(b) and Official Comment.

23-1-23-3 Official comments

(a) This subsection in the RMA provides that a foreign corporation may register its corporate name if the name is distinguishable upon the records of the Secretary of State "from the corporate names that are not available under section 4.01(b)(3)." For two reasons, this cross-reference was replaced in the BCL by a general cross-reference to IC 23-1-23-1.

First, the specific subsection cross-referenced by the RMA, which grants exclusivity to fictitious names adopted by foreign corporations, was deleted in the BCL. *See* IC 23-1-23-1(b) and Official Comment. Second, the limited cross-reference to but one of the subdivisions of IC 23-1-23-1(b), rather than to the entire subsection that enumerates all of the classes of names from which a proposed name must be distinguishable, is apparently an error. Read literally, the RMA would authorize the registration of any foreign corporation name that is not identical to the fictitious name adopted by another foreign corporation, even if that name *were* identical, for example, to the name of an Indiana corporation. Since this could not have been the intent of this subsection, a general cross-reference to IC 23-1-23-1 was inserted in place of the RMA's reference to only one subdivision of that section.

(d) The words "filing of the" were inserted before "renewal application" in the last sentence of this subsection for precision and clarity.

23-1-24-3 Official comments

Subsection (a)

Subsection (a) was amended in 1995 to require the registered agent to sign and deliver the registered agent's statement of resignation to the Secretary of State for filing as described in IC 23-1-18. IC 23-1-18 sets forth the requirements a document must satisfy to be entitled to filing by the Secretary of State.

Subsection (b)

The words "if known" were added after the requirement that the Secretary of State mail a copy of a registered agent's resignation notice to a corporation's "principal office" because (a) articles of incorporation need not list the corporation's principal office, *see* IC 23-1-21-2(a) and (b), therefore, the Secretary of State may not know the location of that office until the corporation files its annual report, which is required to include that information. *See* IC 23-1-53-3.

23-1-24-4 Official comments

Section (b)

The language "or other executive officer as that term is used in Trial Rule 4.6(a)(1)" was added to this subsection to specify additional permitted addressees for service of process, because the Commission believed the BCL's provisions in this area should be consistent with those of the Indiana Rules of Procedure. Ind.Tr.R. 4.6(A)(1) authorizes service of process upon any "executive officer" of a domestic or foreign corporation. Ind.Tr.R. 83(2) in turn provides:

"Executive officer" includes the president, vice president, secretary, treasurer, cashier, director, chairman of the board of directors or trustees, office manager, plant manager, or subdivision manager, partner, or majority shareholder. For purposes of service of process, notice and other papers, the term includes the personal secretary of any of the foregoing persons or any person employed under or with any of the foregoing persons and who is entrusted with responsible handling of legal papers. It also includes any person employed in the organization if such person promptly delivers the papers served to one of the foregoing.

Subsection (c)

This subsection, which is unchanged from the RMA, should resolve any inconsistencies that might otherwise exist between section 4 and the Indiana Rules of Procedure. If the latter permit service by a method not expressly recognized under section 4, that method should be considered an additional permitted means of perfecting service on a corporation that supplements the BCL's service rules rather than being inconsistent with them.

Burger Man, Inc. v. Jordan Paper Products, Inc., 352 N.E.2d 821 (1976) is illustrative. In Burger Man, service upon the vice-president rather than the resident agent of a corporation was held sufficient under Ind.Tr.R. 4.6(A)(1)'s authorization of service of process upon an "executive officer" or "an agent appointed or deemed by law to have been appointed to receive service." The BCL authorizes service upon an "executive officer" only "[i]f a corporation has no registered agent, or the agent cannot with reasonable diligence be served." IC 23-1-24-4(b). Since subsection (c) states that IC 23-1-24-4 "does not prescribe the only means, or necessarily the required means, of serving a corporation," the Burger Man holding can be viewed as consistent with the BCL's overall service provisions. In any event, the Indiana courts have consistently held that the Indiana Rules of Procedure will take precedence over any conflicting statutory provisions. *See, e.g. In re Little Walnut Creek Conservancy District*, 419 N.E.2d 170 (Ind. Ct. App.1981).

23-1-25-1 Official comments

(a) The RMA requirement that articles of incorporation prescribe the "classes of shares" was deleted from this subsection to ensure consistency with IC 23-1-21-2(a), which provides with respect to shares that the articles need set forth only "the number of shares the corporation is authorized to issue." As the RMA Official Comments to this subsection themselves recognize, "[i]f the articles authorize the issue of only one class of shares, no designation or description of the shares is required, it being understood that these shares have both the power to vote and the power to receive the net assets of the corporation upon dissolution." MODEL BUSINESS CORP. ACT ANN. § 6.01(a) (3d ed. 1985). *See also* IC 23-1-25-1(b).

However, if the articles do authorize more than one class of shares, the number of shares in and a distinguishing designation for each class must be prescribed. Also, if more than one class is authorized (either originally or at some point after initial incorporation), the preferences, limitations and relative rights of each class must be described in the articles of incorporation before any shares of that class are issued.

(c) The words "have one (1) or more of the following characteristics" were added to the end of the introductory phrase in subsection (c) to clarify that classes of shares need not possess *all* of the listed optional characteristics.

23-1-26-2 Official comments

(b) A cross-reference to IC 23-1-53-2(b) was added to alert the reader to that section's reporting requirement, under which a corporation must either (a) advise its shareholders with or before the notice of the next shareholders' meeting of the number of shares authorized to be issued in consideration for promissory notes or promises of future services, or (b) if the corporation is subject to the Securities Exchange Act of 1934, comply with the proxy disclosure provisions of that Act with respect to such authorizations.

Subsection (b)'s rule that promissory notes and promises of future services constitute permissible consideration for shares is in marked contrast to the GCA's express prohibition of these forms of consideration. *See* IC 23-1-2-6(e) (repealed 1986). The Commission believed that allowing these forms of consideration provides desirable corporate flexibility, and will often be useful in issuing shares to corporate directors and officers (whether in connection with the formation of a corporation or thereafter). (The GCA did permit loans to officers or directors for the purpose of purchasing shares, but only for that purpose. *See* IC 23-1-2-18. The BCL permits loans to directors for any purpose if approved under IC 23-1-35-3, and has no prohibition on loans to officers. *See* IC 23-1-35-3 and Official Comment.)

The BCL also eliminates the GCA's express prohibition on accepting uncertified checks in payment for shares, *see* IC 23-1-2-6(e) (repealed 1986), though in practice this rule probably meant only that the shares had not been validly issued until the uncertified check had cleared.

(c) In the RMA, the first sentence of this subsection reads, "Before the corporation issues shares, the board of directors must determine that the consideration received or to be received for shares to be issued is adequate." The BCL substituted the language, "The corporation may issue shares for such consideration received or to be received as the board of directors determines to be adequate."

This change was made to clarify that a formal, separate "adequacy of consideration" determination by the board of directors is not a prerequisite to proper issuance of shares; rather, the board's determination that consideration is adequate may be inferred simply from its approval of the issuance of shares for that consideration. While the Commission preferred the BCL language, the change is not a departure from the RMA intent in this subsection. The RMA Official Comment notes, "The board of directors does not have to make an explicit 'adequacy' determination by formal resolution; that determination may be inferred from a determination to authorize the issuance of shares for a specified consideration." MODEL BUSINESS CORP. ACT ANN. § 6.21(c) (3d ed. 1985).

(e) The parenthetical clauses "(but is not required to)" were added to emphasize the discretionary and permissive nature of subsection (e)'s authorization of placing shares issued in consideration for future services or promissory notes in escrow, or the crediting of distributions with respect to such shares.

23-1-27-2 Official comments

(a) The BCL eliminates the GCA prohibition on reacquisition of shares unless authorized by the articles of incorporation or approved by the shareholders. *See* IC 23-1-2-3 (repealed 1986). The BCL also discards the GCA rule that shares can be redeemed only to the extent of unrestricted and unreserved earned surplus, *see* IC 23-1-2-3 (repealed 1986), and instead treats share redemptions as a "distribution" as defined in IC 23-1-20-7, which like all distributions is subject to the rules of IC 23-1-28.

The RMA provides that reacquired shares automatically become authorized but unissued shares (though such shares will be cancelled, under IC 23-1-27-2(b), if the articles of incorporation prohibit their reissuance). Thus, the RMA eliminates the concept of "treasury shares." Though the BCL establishes a presumption of "authorized but unissued" status for reacquired shares, the Commission recommended that corporations be given the option, in their articles of incorporation, to treat reacquired shares as "treasury shares." In 1987, subsection (a) was amended to permit exercise of this option by a board resolution as well as an articles provision.

Though the Commission believed the "treasury share" option would have limited usefulness under the BCL, there are some circumstances in which corporations may wish to elect such treatment. For example, retention of treasury share treatment may avoid the need to amend an employee benefit plan funded with treasury shares. Treasury shares may also be subject to lower relisting fees on the New York Stock Exchange.

Subsection (a)'s requirement that "treasury share" treatment must be elected either by the articles of incorporation or a board resolution applies only to reacquisitions of shares *after* the date a corporation became subject to the BCL. With respect to treasury shares already in existence on that date, a corporation had the option (without any special articles provision or action by the board) either to continue to treat such shares as treasury shares, *see* IC 23-1-27-2(d), or to view such shares as automatically converted to the status of authorized but unissued shares. A corporation that elected the latter option was not required to comply with the GCA "cancellation" procedures set forth in IC 23-1-4-9 (repealed 1986).

Because "treasury shares" are not defined by the BCL, the GCA definition will apply for corporations that elect to retain treasury shares. *See* IC 23-1-27-2(d) and Official Comment.

(c) The words "for purposes of subsection (b)" were added to subsection (c) to clarify the "articles of amendment" to which the latter subsection refers.

(d) Subsection (d) was included, consistent with the "treasury share" option authorized by IC 23-1-27-2(a), to state expressly that a corporation governed by the BCL retains "authority to use, hold, acquire, cancel, and dispose of treasury shares (as defined in prior law)." The GCA defines "treasury shares" in IC 23-1-1-1(n). *See also* IC 23-1-27-2(a) & -2(d) and Official Comments.

In the BCL as initially enacted in 1986, the express statement of authority to use treasury shares was codified at IC 23-1-54-1 (repealed 1986). The 1987 amendments slightly reworded the statement, recodified it as a subsection to IC 23-1-27-2 (which addresses the whole subject of reacquired shares), and repealed IC 23-1-54-1.

(e) Because IC 23-1-27-2(a) & -2(d) provide a "treasury share" option not found in the RMA, subsection (e) was added in 1987 to clarify that any such treasury shares will, when cancelled, be treated as authorized but unissued shares, unless the board of directors adopts an amendment to the articles of incorporation reducing the number of authorized shares by the number of treasury shares so cancelled. The board may adopt such an amendment without shareholder approval. *See* IC 23-1-38-2(6).

"Cancellation," as used in this subsection, means "cancellation" of treasury share status for the shares. The shares themselves will not be "cancelled" entirely unless the board also elects to reduce the number of authorized shares by adopting the articles amendment permitted by the subsection.

Cancellation of treasury share status under the BCL may be done by simple board resolution, without need for any filing with the Secretary of State or compliance with any other procedures of the sort prescribed by the GCA in IC 23-1-4-9 (repealed 1986). Also, it should be noted that not even a board resolution is required with respect to treasury shares that were in existence when a corporation became subject to the BCL (as opposed to shares reacquired after that date for which "treasury share" status is elected under subsection (a)). As noted earlier, for treasury shares already in existence when a corporation became governed by the BCL, a corporation could elect either to continue "treasury share" treatment or to view such shares as automatically converted to the status of authorized but unissued shares, in either case without need for any special provision in its articles of incorporation or action by its board of directors. *See* IC 23-1-27-2(a) and Official Comment.

23-1-28-3 Official comments

For stylistic reasons, the introductory phrase "A distribution may not" was substituted for the RMA language "No distribution may."

Section 3's distribution tests, discussed extensively in the RMA Official Comments, differ markedly from the now discarded GCA "capital surplus" tests. *See* IC 23-1-2-15 (repealed 1986). Also, the BCL tests apply to "distributions" (a concept not found in the GCA), which includes cash dividends, share redemptions and any other "direct or indirect transfer of money or other property (except a corporation's own shares) or incurrence or transfer of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares under IC 23-1-28." IC 23-1-20-7.

23-1-29-2 Official comments

Subsection (a)

The GCA permitted special shareholder meetings to be called by the board of directors, the president and by the holders of at least 25% of the outstanding shares. IC 23-1-2-9(d) (repealed 1986). Subsection (a) replaces the GCA designation of the president with any "person or persons specifically authorized" in the articles of incorporation or bylaws and removes the 25% threshold for calling special meetings by the shareholders of a corporation with more than fifty shareholders.

Subsection (b)

Subsection (b)(2), however, retains the 25% threshold for calling special meetings by the shareholders of a corporation with fifty or fewer shareholders, rather than the RMA's 10% threshold.

The BCL procedure for shareholders of a corporation with fifty or fewer shareholders to call a special meeting differs from the GCA, which permitted 25% or more of the shareholders to issue the meeting notice directly. Under the BCL, the shareholders must submit a written demand for the meeting to the corporation's secretary and the corporation itself issues the notice of the meeting. If the corporation fails to do so within 60 days after delivery of the demand, the shareholders may then ask a court to order the meeting under IC 23-1-29-3(2)(A).

Subsection (e)

As with IC 23-1-29-1(d) (dealing with annual meetings), subsection (e), not found in the RMA, was added to retain the GCA's authorization of teleconference special shareholder meetings, if the corporation's articles of incorporation or bylaws so permit. See IC 23-1-2-9(b) (repealed). Again, however, the GCA restriction of this option to corporations with ten or fewer shareholders was deleted as arbitrary and unnecessary, given the requirement that all shareholders participating in the teleconference meeting must be able simultaneously to hear each other during the meeting.

23-1-29-4 Official comments

(b) Because the RMA subsection authorizing a court to fix a record date for a court-ordered shareholders' meeting was deleted, *see* IC 23-1-29-3 and Official Comment, this subsection's cross-reference to that deleted subsection was also eliminated.

(c) Subsection (c), which has no RMA counterpart, was added in 1987 both to specify effective dates of shareholder written consents and to authorize such consents to specify prior or subsequent effective dates. The subsection's rules are identical to those of IC 23-1-34-2(b) for director written consents. The GCA did not expressly authorize prior effective dates for shareholder written consents. *See* IC 23-1-2-9(p) (repealed 1986).

(e) The GCA did not require notice to nonvoting shareholders of action taken by shareholder written consent. *See* IC 23-1-2-9(p) (repealed 1986).

23-1-29-4.5 Official comments

Prior to the enactment of this section, the BCL followed the RMA, which provided that shareholders were permitted to take action by written consent in lieu of a meeting only if such consent was unanimous. This section, which has no RMA counterpart, was added in 2003 and provides the new default rule that action may be taken by written consent of less than all of the shareholders entitled to vote. This default rule may be modified in the corporation's articles of incorporation. It also does not apply to any corporation that has a class of voting shares registered under Section 12 of the Securities Exchange Act of 1934.

A statement in a corporation's articles of incorporation must expressly require actions to be taken by unanimous written consent, to prohibit the use of a written consent under subsection (b) by less than all shareholders entitled to vote.

The requirement in subsection (c) for prior notice to shareholders of actions proposed to be taken by written consent of less than all shareholders entitled to vote is not intended to invoke the requirement in IC 23-1-29-4(e) to give prior notice to nonvoting shareholders in all cases where an action is to be taken by unanimous written consent under that section.

23-1-29-5 Official comments

Subsection (d)

Because the RMA subsection authorizing a court to fix a record date for a court-ordered shareholders' meeting was deleted, *see* IC 23-1-29-3 and Official Comment, this subsection's cross-reference to that deleted subsection was also eliminated.

Subsection (f)

Subsection (f), which has no RMA counterpart, was added in 2005 to authorize mailing notice using a class of mail other than first class, certified or registered United States mail or other private carrier service, as would be required by the definition of "mail" in IC 23-1-20-15, if the shares are registered under the Exchange Act and if the information required in the notice is available to the public as provided therein. The effect of subsection (f) is to override the requirements for giving notice in IC 23-1-20-29 pursuant to IC 23-1-20-29(g), although the effective date of notice given under subsection (f) is still governed by IC 23-1-20-29(e). Notice given pursuant to subsection (f), where applicable, will satisfy IC 23-1-29-5. In cases where subsection (f) is not applicable, the rules of IC 23-1-20-29 and the definition of "mail" in IC 23-1-20-15 will continue to apply.

23-1-30-1 Official comments

(b) Subsection (b) reflects a number of changes from the RMA. First, the words "entitled to vote at the meeting" were added to the first sentence because the Commission recommended that access to shareholder lists should be limited to voting shareholders.

Second, the RMA requires a shareholders' list to be available for inspection beginning two business days after notice of the meeting for which the list was prepared and continuing through the meeting. The GCA (which authorized inspection of shareholder lists only for meetings for election of directors) required that the list be available beginning five days before the meeting. IC 23-1-2-9(o) (repealed 1986). The Commission recommended retaining the GCA rule, though "five days" was expanded to "five business days."

Third, the words "authorized in writing" were added immediately after the words "the shareholder's agent or attorney." Since a corporation is required to permit access to the shareholders' list only upon written demand, the Commission believed an agent's or attorney's authority should also be in writing.

Fourth, the BCL makes the right to inspect the shareholders' list, as well as to copy it, subject to IC 23-1-52-2(c)'s requirements that the shareholder's demand be made in good faith and for a proper purpose (described with reasonable particularity), and that the records be directly connected with the shareholder's purpose. *See* IC 23-1-52-2(c) and Official Comment. The RMA imposes these rules only on demands to copy the list.

Subsection (b) also reflects material differences from the GCA. As noted above, the GCA's inspection rules applied only to meetings for election of directors; also, the GCA did not expressly recognize any right to copy a shareholders' list. *See* IC 23-1-2-9(o) (repealed 1986). The BCL rules apply to all meetings, and do expressly state a right to copy the list. The GCA did not, however, impose any restrictions on the right to inspect the list of the sort set forth in IC 23-1-52-2(c).

(c) The words "authorized in writing" were added immediately after the words "the shareholder's agent or attorney" for the same reason they were added in subsection (b). *See* IC 23-1-30-1(b) and Official Comment.

(d) The words "authorized in writing" were added immediately after the words "the shareholder's agent or attorney" for the same reason they were added in subsection (b). *See* IC 23-1-30-1(b) and Official Comment. Also, the phrase "during the period specified in subsection (b)" was substituted for the RMA language "before or at the meeting" to state with greater specificity the period during which inspection and copying are permitted.

Subsection (d) also deletes the RMA adverb "summarily" before the words "order the inspection or copying," both because the meaning of "summarily" is unclear and to eliminate any suggestion that something other than ordinary judicial processes should apply in adjudicating any application for court-ordered inspection and copying.

RMA language authorizing a court to order inspection or copying at the corporation's expense, and postponement of the meeting until inspection or copying was completed, was also deleted.

As a policy matter, the Commission recommended against including statutory provisions suggesting that these remedies should necessarily be a part of whatever equitable relief a court might find appropriate in a particular inspection and copying dispute.

(f) Subsection (f) was added to ensure that the protections imposed by IC 23-1-52-5, which restricts a shareholder's use and distribution of information obtained from corporate records "solely to the proper purpose" stated by the shareholder in requesting inspection and copying of such records, *see* IC 23-1-52-5 and Official Comment, also apply to the use and distribution of information obtained from inspecting or copying a shareholders' list under IC 23-1-30-1. Neither subsection (f) nor IC 23-1-52-5 has any RMA or GCA counterpart.

23-1-30-3 Official comments

The BCL does not carry forward the GCA rule, *see* IC 23-1-2-9(e) (repealed 1986), entitling a person who acquired title to a share after a record date has passed to receive, on written request to the record shareholder from whom the share was acquired, a proxy to vote that share. *See* Official Comment to IC 23-1-29-7(a).

Subsection (b)(2)

The BCL was amended in 1998 to clearly authorize shareholders to submit their proxies "by any electronic means, including data and voice telephonic communications and computer network." A corporation wishing to utilize electronic voting of shares is still required to send a proxy statement and proxy form to shareholders.

A copy, facsimile telecommunication, or other reliable reproduction of the writing or electronic submission may be used instead of the original writing or electronic submission for all purposes for which the original writing or electronic submission may be used if the copy, facsimile telecommunication, or other reproduction is a complete copy of the entire original writing or electronic submission.

Subsection (d)

The words "shorter or" were added in 1987 to permit a proxy to specify an effective period of less than the standard 11-month period as well as a longer period.

23-1-30-6 Official comments

(c) The GCA treated abstentions as negative votes by requiring for approval of various corporate actions the affirmative vote of a majority of shares entitled to vote thereon. *See* IC 23-1-4-3 (amendment of articles of incorporation); IC 23-1-5-2(b) (repealed 1986) (merger); IC 23-1-5-3(b) (repealed 1986) (consolidation); IC 23-1-6-3 (repealed 1986) (special corporate transaction); IC 23-1-7-1(b)(2) (repealed 1986) (dissolution). Approval of an action under the BCL requires only that the number of shares voted in favor of the action exceed the number of shares voted against.

(d) The RMA specified two types of actions requiring a shareholder vote to which the standard voting rules of this section do not apply. One is election of directors, which (as subsection (d) provides) is governed by IC 23-1-30-9. The other is set forth in RMA § 7.25(d), which states:

An amendment of articles of incorporation adding, changing, or deleting a quorum or voting requirement for a voting group greater than specified in subsection (b) or (c) is governed by section 7.27.

This RMA subsection was deleted because the provisions to which it refers - RMA § 7.27(b), establishing greater voting and quorum requirements for articles amendments that change voting and quorum requirements - were themselves deleted. *See* IC 23-1-30-8 and Official Comment.

23-1-33-5 Official comments

(d) Subsection (d)'s rule that the term of a director elected to fill a vacancy expires "at the end of the term for which the director's predecessor was elected" replaces RMA language providing that the replacement director's term ends "at the next shareholders' meeting at which directors are elected." The BCL and RMA rules yield different results only if a corporation has "staggered" the terms of directors under IC 23-1-33-6.

The RMA rule, as explained in the RMA Official Comments, "reflects the view that the power to fill a vacancy by the directors is an interim power to avoid the need for a special shareholders' meeting; if, however, an election of directors by shareholders is to occur in any event, the director elected by the board to fill a vacancy should be considered by the shareholders, whether or not his term has expired." MODEL BUSINESS CORP. ACT ANN. § 8.05(d) (3d ed. 1985). The GCA rule was similar, providing that a director chosen to fill a vacancy served only until the next annual or special shareholders' meeting. IC 23-1-2-11(e) (repealed 1986).

The Commission believed, however, that the RMA and GCA rules were inconsistent with one of the primary purposes of staggered board provisions - namely, to promote continuity of philosophy and management on the board by having only one-half or one-third of the directors elected at any annual meeting. Accordingly, the BCL rejects the RMA requirement that a director chosen to fill a vacancy serves only until the next annual meeting regardless of the term of the director he replaced, and provides instead that a replacement director will serve out his predecessor's full term. If a corporation does want to have the shareholders fill any vacancies on the board, it may so provide in its articles of incorporation. *See* IC 23-1-33-9.

23-1-33-6 Official comments

The RMA previously required that the articles of incorporation directly establish any staggered board provisions. The words "or, if articles of incorporation so authorize, the bylaws", which were originally added to the RMA language, were deleted from subsection (a) in 2001 to allow either the articles of incorporation or the bylaws to authorize staggered terms. This change provides additional flexibility over the GCA rule. *See* IC 23-1-2-11(d) (repealed 1986).

Both the RMA and the GCA required that there be at least nine directors before a board could be staggered. The 1987 amendments to the BCL eliminated this requirement on recommendation by the Commission because the Commission believed the benefits of institutionalizing continuity on the board of directors should be available to corporations with fewer than nine directors. The amended section makes it clear, however, that at least one director must be elected at each annual meeting.

23-1-33-8 Official comments

(a) The first sentence of subsection (a), which follows the GCA language in IC 23-1-2-12 (repealed 1986), replaces the RMA rule that "[t]he shareholders may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause." Under the BCL provision, a corporation that wishes to adopt the RMA rule (or similar provisions) authorizing shareholder removal of directors, or to limit or eliminate the board's authority to remove directors, must do so in its articles of incorporation.

The second sentence of the BCL subsection, authorizing the board itself to remove directors "with or without cause unless the articles of incorporation provide otherwise," is found in neither the RMA nor the GCA (though a corporation was free under the GCA to authorize board removal of directors in its articles of incorporation).

The BCL deleted in its entirety, however, RMA § 8.09, which authorized 10% of a corporation's shareholders to commence judicial proceedings for removal of a director. Notwithstanding the RMA Official Comment that this section "is not intended to permit judicial resolution of internal corporate struggles for control" except when a director is "guilty of wrongful conduct," MODEL BUSINESS CORP. ACT ANN. § 8.09, the Commission believed the provision was inherently susceptible to abuse in precisely this area, and considered it inappropriate to authorize judicial intervention in disputes about whether a director should continue on the board.

(d) The phrase "if they are otherwise authorized to do so" was added to reflect the changes in subsection (a), which eliminated the RMA rule generally authorizing shareholder removal of directors.

23-1-35-1 Official comments

Subsection (a)

The phrase "based on facts then known to the director" was added to subsection (a) to emphasize that a director's conduct must be judged based on what he knew at the time of a decision, and not on what the benefit of hindsight may later reveal.

The general "standard of conduct" established by this subsection is substantially similar to that set forth in the GCA. *See* IC 23-1-2- 11(a)(2) (repealed 1986). Under the BCL, however, a director's breach or failure to perform his duties in compliance with the standard of conduct does not permit imposition of personal liability on the director unless the breach or failure to perform "constitutes willful misconduct or recklessness." *See* IC 23-1- 35-1(e) and Official Comment.

Subsection (d)

Subsection (d), which has no RMA counterpart, was added as an illustrative, nonexhaustive list of certain factors a director may consider in deciding what is in "the best interests of the corporation." The subsection makes clear that a director is not required to view presently quantifiable profit maximization as the sole or necessarily controlling determinant of the corporation's "best interests."

The kind of additional factors that subsection (d) establishes as appropriate considerations for a director have been noted by many observers, including former United States Supreme Court Justice Lewis Powell in the following passage from his concurring opinion in *Edgar v. MITE Corp.*, 457 U.S. 624, 646 (1982):

When corporate headquarters are transferred . . ., the State and locality from which the transfer is made inevitably suffer significantly. Management personnel--many of whom have provided community leadership--may not move to the new corporate headquarters. Contributions to cultural, charitable, and educational life--both in terms of leadership and financial support--also tend to diminish when there is a move of corporate headquarters.

The Commission recommended adding subsection (d) to eliminate any argument that a director's consideration of factors such as those noted by Justice Powell, as well as other matters of the sort described in the subsection, was somehow "inappropriate," or "inconsistent" with the director's duty to consider a corporation's "best interests."

Subsection (e)

The RMA provides simply that a director is not liable for any action or failure to take action if he performed his duties as such in compliance with the statutory standard of conduct. The BCL adds a critical additional prerequisite to any imposition of personal liability on a director, namely, that his breach or failure to perform his duties must also constitute "willful misconduct or recklessness."

Subsection (e), while substantially narrowing the circumstances in which personal liability may be imposed on directors, does not alter the director's statutory duties themselves. Hence, a director's failure to exercise "the care an ordinarily prudent person in a like position would exercise under similar circumstances," *see* IC 23-1-35-1(a)(2), may have legal significance with respect to the validity of corporate action, even if the failure did not amount to "willful misconduct or recklessness."

But negligence, regardless of "degree," cannot satisfy subsection (e)'s "willful misconduct or recklessness" prerequisite to imposition of personal liability on a director. Though Indiana courts have traditionally refused to recognize degrees of negligence, *see, e.g.*, *Heiny v. Pennsylvania R. Co.*, 221 Ind. 367, 47 N.E.2d 145 (1943); *Birdsong v. ITT Continental Baking Co.*, 160 Ind. App. 411, 312 N.E.2d 104 (1974), subsection (e)'s standard is and was intended to be different from the "gross negligence" standard applied in some other jurisdictions, see, e.g., *Smith v. Van Gorkum*, 488 A.2d 858 (Del.1985). "Willful misconduct" or "recklessness" require, at minimum, a conscious disregard of or indifference to the consequences of a risky act. See, e.g., *Orkin Exterminating Co. v. Trainar*, 486 N.E.2d 1019, 1023 (Ind. 1986); *Castetter v. Barnard*, 98 Ind. App. 210, 228, 183 N.E.2d 681, 688 (1932). "Gross negligence" involves more than ordinary inadvertence, but less than such conscious disregard or indifference. *See* W. Prosser & P. Keeton, *The Law of Torts* 212 (5th ed. 1984).

Subsection (e)'s standard of liability is a conscious response to the serious problems that have arisen due to the increasing amount of litigation against directors, the increasing expense of defending such claims, and the increasing cost (and decreasing availability and scope) of director and officer liability insurance. These developments have in turn made it increasingly difficult for corporations to persuade qualified individuals to serve on boards of directors. Narrowing the bases for imposition of personal liability on directors was recommended by the Commission, and adopted by the General Assembly, as a crucial part of Indiana's efforts to reverse that trend. Subsection (e) reflects the public policy of Indiana that personal liability should be imposed on directors only in limited circumstances and should be construed in furtherance of that objective.

23-1-37-8 Official comments

(a) The RMA introductory phrase, "Except as provided in subsection (d)," was deleted from subsection (a) because RMA § 8.51(d) was, as discussed below, deleted in its entirety.

Subsection (a)'s authorization of indemnification for "liabilities incurred in a proceeding" is broader than the comparable GCA provision, which permitted indemnification for "expenses" only. *See* IC 23-1-2-2(b)(9) (repealed 1986). This expansion is consistent with the general purposes of the BCL's authorization of broad and expanded indemnification, discussed in the Introductory Official Comment to Chapter 37.

Subsection (a)(3), dealing with the indemnification standard of conduct in connection with criminal proceedings, includes an alternative formulation not found in the RMA - namely, that an individual had reasonable cause to believe his "conduct was lawful." The Commission thought that the RMA standard - no reasonable cause to believe "conduct was unlawful" was insufficient, standing alone, because the complexity of modern corporate management and securities transactions often creates "gray areas" about the legality or illegality of conduct. In many situations, a corporate director or officer relying on professional and expert advice may well have reasonable cause to believe that action is "lawful" even though he cannot categorically say, given the "gray areas" in a particular statute or regulation, that he has "*no* reasonable cause" to believe that the action may finally be determined to be "*un* lawful." Subdivision (3)(A)'s alternative formulation was added because the Commission believed a reasonable belief of lawfulness should be sufficient to authorize indemnification, even if the absence of any reasonable basis for a belief of unlawfulness cannot be shown.

The Commission also recommended deleting in their entirety RMA § 8.51(d) & (e), which provide:

(d) A corporation may not indemnify a director under this section:

(1) in connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

(2) in connection with any other proceeding charging improper personal benefit to him, whether or not involving action in his official capacity, in which he was adjudged liable on the basis that personal benefit was improperly received by him.

(e) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding.

The effect of RMA § 8.51(d) is to prohibit voluntary indemnification in connection with direct or derivative actions on behalf of the corporation and in "improper benefit" cases. The RMA Official Comments state that an individual may still apply for court ordered indemnification under RMA § 8.54 (codified in the BCL at IC 23-1-37-11), even though it is "unlikely" that a person found liable in the cases addressed by the subsection would be able to meet the general standards of conduct of RMA § 8.51(a) (codified as subsection (a) here). *See* MODEL BUSINESS CORP. ACT ANN. § 8.51(d) (3d ed. 1985).

In essence, then, RMA § 8.51(d) simply imposes a "court approval" requirement on indemnification in the cases covered by the subsection. The Commission concluded, however, that if a person in fact met subsection (a)'s standards, *i.e.* demonstrating that his conduct was in good faith and that he reasonably believed his conduct was in (or, as to action not in an "official capacity," was not opposed to) the corporation's best interests, court approval should not be a prerequisite to indemnification in such cases.

RMA § 8.51(e) restricts indemnification for actions brought by or in the right of the corporation to "reasonable expenses incurred" in connection therewith, and excludes amounts paid to settle the substantive claim. Since RMA § 8.51(d) prohibits all but court ordered indemnification when a person is found liable in such a suit, the effect of RMA § 8.51(e), as the RMA Official Comments state, is simply to limit indemnification when such suits are settled, thereby avoiding the "circularity" of a corporation's indemnifying a party for amounts paid to the corporation in settlement. *See* MODEL BUSINESS CORP. ACT ANN. § 8.51(e) (3d ed. 1985). Here, too, however, the Commission concluded that indemnification should not be prohibited so long as a person can in fact meet IC 23-1-37-8(a)'s indemnification standards - notwithstanding formalistic concerns about "circularity."

The Commission's recommendations on deleting RMA § 8.51(d) & (e) are consistent with the indemnification standards specified in subsection (a), with the express authority for corporations to adopt broader or narrower indemnification rules under IC 23-1-37-15 and with the general purposes served by authorizing broad and expanded indemnification, *see* Introductory Official Comment to IC 23-1-37.

23-1-37-11 Official comments

(2) Because RMA § 8.51(d) & (e) were deleted from the BCL, *see* IC 23-1-37-8(a) and Official Comment, the RMA words "or was adjudged liable as described in section 8.51(d), but if he was adjudged so liable his indemnification is limited to reasonable expenses incurred," were deleted at the end of subsection (2).

23-1-37-13 Official comments

(1) The words "whether or" were substituted for the RMA words "who is" in subsection (1), to eliminate the RMA implication that entitlement to mandatory and court-ordered indemnification (under IC 23-1-37-9 & -11, respectively) may differ depending on whether an officer is or is not also an [a] director.

(2) The words "whether or" were also substituted for the RMA words "who is" in subsection (2), to eliminate the RMA implication that the scope of voluntary indemnification may differ depending on whether an officer, employee or agent is or is not also a director.

(3) The words "whether or" were also substituted for the RMA words "who is" in subsection (3), to eliminate the RMA implication that availability of indemnification under a corporation's articles of incorporation, bylaws, general or specific action by its directors or by contract may differ depending on whether an officer, employee or agent is or is not also a director.

In this subsection, unlike subsections (1) and (2), the RMA implication eliminated by the BCL was clearly intended. RMA § 8.58 (significantly changed in the BCL, *see* IC 23-1-37-15 and Official Comment) provides that a *director* indemnification provision in a corporation's articles of [incorporation], bylaws, board resolution or contract "is valid only if and to the extent the provision is consistent with" the RMA's statutory indemnification rules. The negative pregnant is RMA § 8.58's limitations on nonstatutory indemnification do not apply to non-director officers, employees or agents.

The Commission rejected the RMA approach both in IC 23-1-37-15 and in subsection (3) here. Instead, it recommended retaining the GCA rule, which recognized the validity of nonstatutory indemnification provisions, regardless of whether they applied to a director, officer, employee or agent. *See* IC 23-1-2-2(b)(9) (repealed 1986).

23-1-37-15 Official comments

This section, like RMA § 8.58, expressly recognizes the validity of nonstatutory indemnification provisions, but does so far more liberally than its RMA counterpart.

(a) Subsection (a) replaces the first sentence of RMA § 8.58(a), which reads:

…A provision treating a corporation's indemnification of or advance for expenses to directors that is contained in its articles of incorporation, bylaws, a resolution of its shareholders or board of directors, or in a contract or otherwise, is valid only if and to the extent the provision is consistent with this subchapter.

This RMA language establishes a special limit on nonstatutory provisions for indemnification of *directors* not included in its rule on nonstatutory provisions for officers, employees or agents, for whom the only limit is that extra-statutory indemnification be "consistent with public policy." *See* RMA § 8.56(3) (codified, with changes, at IC 23-1-37-13(3)).

Both here and in IC 23-1-37-13(3), however, the Commission rejected the RMA approach and recommended retaining the GCA rule, which expressly recognized the validity of nonstatutory indemnification provisions, regardless of whether they applied to a director, officer, employee or agent. *See* IC 23-1-2-2(b)(9) (repealed 1986). The Commission believed, particularly in light of the considerations discussed in the Introductory Official Comment to IC 23-1-37, that corporations should, as a matter of public policy, be authorized to fashion nonstatutory indemnification provisions to meet their particular needs. To be sure, corporations must be mindful of other statutory and regulatory standards in developing such provisions. But the Commission did not believe the BCL should establish additional limits on corporate flexibility in this area.

Subsection (a) does not limit or affect any rights to indemnification and advance for expenses that may exist pursuant to contract.

(b) Subsection (b) is based on the second sentence of RMA § 8.58(a), which reads:

…If articles of incorporation limit indemnification or advance for expenses, indemnification and advance for expenses are valid only to the extent consistent with the articles.

This RMA language was expanded in subsection (b) to recognize the validity of limits on indemnification expressed in bylaws, board of directors or shareholder resolutions, or other duly adopted authorizations of indemnification or advance for expenses, as well as limits expressed in articles of incorporation.

Subsection (b) does *not*, however, permit bylaws, board or shareholder resolutions, or other authorizations of indemnification and advance for expenses to limit the *mandatory* indemnification for directors and officers provided by IC 23-1-37-9, -11 & -13. As those sections provide, any limit on these statutory provisions for mandatory indemnification must be stated in a corporation's articles of incorporation.

(c) The words "officer, employee or agent" were added in subsection (c) to state expressly that a corporation's power to pay or reimburse witness expenses for these persons, as well as for directors, is also not limited by this Chapter (though subsection (c)'s applicability to non-directors is already implicit under IC 23-1-37-13(2)).

23-1-38-1 Official comments

(a) The infinitive "to be" was added throughout subsection (a) for clarity.

(b) The purpose of subsection (b), as explained in the RMA Official Comments, is to eliminate any remaining vestiges of the "vested rights" doctrine, now generally rejected by the courts, under which "particular rights of shareholders were 'vested' in individual shareholders and thus immune from change by the corporation in the absence of unanimous consent of the shareholders." MODEL BUSINESS CORP. ACT ANN. § 10.01(b) (3d ed. 1985).

The Commission agreed with the RMA purpose, but believed the "vested rights" doctrine should be clearly eliminated with respect to amendments of bylaws as well as amendments of articles of incorporation. Accordingly, the phrase "or authorized to be in the bylaws by this article or the articles of incorporation" was added to subsection (b), thereby ensuring that corporations have the freedom to amend bylaws, or to decline to include a provision otherwise permitted to be in the bylaws, without being confronted with a "vested rights" challenge.

23-1-38-2 Official comments

The GCA required shareholder approval of all amendments to the articles of incorporation except those relating to cancellation of shares. *See* IC 23-1-4-3, -9 & -10 (repealed 1986). This and other sections of the BCL permit direct amendment of the articles by the board of directors, without shareholder action, in a variety of other contexts.

(4) The phrase "or a lesser number of whole shares and fractional shares" was added to subsection (4) to permit a board of directors to effect a reverse share split without shareholder approval. In most cases, a reverse share split, like a regular or "forward" share split, will essentially be a matter of form, not substance, that does not change a shareholder's proportionate ownership of or interest in the corporation. *See Anacomp, Inc. v. Wright*, 449 N.E.2d 610 (Ind. App. 1983). However, a reverse share split accompanied by a redemption of any resulting fractional shares, *see* IC 23-1-25-4(a)(1), can alter proportionate ownership. In either case, though, a reverse share split requires no shareholder approval.

(5) The power to substitute words of "corporateness" granted by subsection (5) includes substitution of words of like import in another language. *See* IC 23-1-23-1(a)(1).

(6) Subsection (6) was added in 1987 to reflect the board of directors' authority to amend the articles of incorporation, without shareholder approval, to reduce the number of authorized shares due to a cancellation of "treasury shares." *See* IC 23-1-27-2(e) and Official Comment.

(7) Subsection (7) refers generally to other BCL sections authorizing direct amendment of articles of incorporation by the board of directors. *See, e.g.,* IC 23-1-25-2(d) (amendments stating determinations by the board of the designations and relative rights, preferences and limitations of a class or series of shares); IC 23-1-27-2(c) (amendments reducing the number of authorized shares by the number of reacquired shares if the articles prohibit reissuance of the latter).

23-1-38-3 Official comments

(d) The second "must" in the second sentence of subsection (d) was added for clarity.

RMA § 13.02(a)(4) grants shareholders dissenters' rights with respect to articles of incorporation amendments that "materially and adversely" affect certain rights of a dissenter's shares. The BCL deleted this provision, and contains no statutory provision of dissenters' rights based solely on amendments to the articles of incorporation. *See* IC 23-1-44-8 and Official Comment.

The GCA did not require either that notice of the shareholders' meeting at which an amendment would be proposed include a copy or summary of the proposed amendment, or that shareholders not entitled to vote on the amendment be given notice. *See* IC 23-1-4-2 (repealed 1986).

(e) The GCA required that all amendments to articles of incorporation be approved by a majority vote of all shares entitled to vote, thereby effectively treating abstentions as negative votes. *See* IC 23-1-4-3 (repealed 1986). Subsection (e) retains this rule only for articles amendments that would create dissenters' rights, and requires for all other amendments only that the number of votes in favor exceed the number of votes against.

The BCL did not adopt RMA § 13.02(a)(1), creating dissenters' rights with respect to articles of incorporation amendments that "materially and adversely" affect certain rights of a dissenter's shares. *See* IC 23-1-44-8 and Official Comment. Nonetheless, a corporation's organic documents or a resolution of the board of directors may still authorize dissenters' rights for articles amendments, *see* IC 23-1-44-8(a)(5), in which case the special majority vote described by subsection (e)(1) would be required to approve such amendments.

23-1-38-7 Official comments

(a) The phrase "or, if the board of directors has not been selected, the incorporators" was added to permit incorporators to restate articles if a board has not yet been selected. *See also* IC 23-1-21-5 & -38-5 and Official Comments.

Unlike subsection (a), which permits restatement of articles of incorporation "at any time," the GCA permitted filing of amended or restated articles only when an articles amendment had been adopted. *See* IC 23-1-4-5 (repealed 1986).

(c) The second "must" in the second sentence of subsection (c) was added for clarity.

23-1-38.5-2 Official comments

Subsection (a)

The purpose of subsection (a) is to establish this chapter as the enabling law for conversions and domestications of corporations and other entities engaged in a business, including those corporations and other entities engaged in a business regulated by other Indiana statutes, unless such statutes either affirmatively prohibit or provide for conversion or domestication.

Subsection (b)

Subsection (b) is a non-exclusive list of prohibited conversions and limits the scope of subsection (a) by prohibiting use of this chapter to convert a mutual insurance company into a stock insurance company (which is governed by IC 27-15-1-1 et seq.) or for conversions involving non-profit corporations. Subsection (b), however, does not affect the power of a non-profit corporation to engage in transactions (other than conversion) with a domestic corporation or another non-profit corporation that are otherwise permitted by applicable law. The 2005 amendment to subsection (b) was consistent with the 2005 amendment to IC 23-1-38.5-1 that defined "other entity."

23-1-38.5-10 Official comments

The 2006 amendments to this section deleted the transition rule previously set forth in subsection (e), expanded the list of permitted conversions and clarified that Section 15, not Section 14, of this chapter governs the effect of converting to a domestic corporation or a domestic other entity, if the organic law of the domestic other entity does not provide for conversion.

Subject to certain restrictions, subsections (a) through (h) authorize the following types of conversion:

(i) a domestic corporation to a domestic other entity;
(ii) a domestic corporation to a foreign other entity;
(iii) a domestic other entity to a domestic corporation;
(iv) a domestic other entity to a different domestic other entity;
(v) a domestic other entity to a foreign other entity;
(vi) a domestic other entity to a foreign corporation;
(vii) a foreign other entity to a domestic corporation or domestic other entity; and
(viii) a foreign corporation to a domestic other entity.

Section 10 does not authorize conversions of domestic corporations to or from foreign corporations, which are regulated as domestications under the preceding sections of this chapter.

Although the list of permitted conversions includes conversions involving foreign entities, this chapter does not supersede the laws of the foreign jurisdiction. If the transaction is a permitted conversion of a domestic entity to a foreign entity, the laws of the foreign jurisdiction must permit the conversion and will govern the effect of the conversion. If the transaction is a permitted conversion of a foreign entity to a domestic entity, the organic law of the foreign corporation or foreign other entity must authorize the conversion and Indiana law will govern the effect of the conversion. This section does not authorize or regulate the manner of effectuating conversions involving solely foreign entities.

Subsection (b)

The phrase "under a plan of entity conversion" was added to clarify that adoption and approval of a plan of entity conversion is required for conversion of a domestic corporation to a foreign other entity.

Subsections (d) through (h)

Subsections (d) through (h) were added to permit conversions not involving a domestic corporation.

Subsection (g)

Subsection (g) replaced former subsection (d) (which previously permitted conversion of a foreign other entity to a domestic corporation only) and was broadened to permit conversion of a foreign other entity to a domestic corporation or domestic other entity.

Subsection (i)

If the organic law of a domestic other entity does not provide procedures for adoption and approval of a plan of entity conversion, the plan must be approved in the same manner as a merger. However, if the organic law of a domestic other entity does not provide procedures for approval of a conversion or merger, subsection (i) provides the necessary procedures. Although the procedures used in such event are the procedures set forth in this chapter and Chapter 40, this subsection is not intended to grant appraisal rights to the interest holders of such entity, unless otherwise provided for by the organic law of such entity.

Subsection (j)

Subsection (j) was added in 2006 to ensure that any shareholder or interest holder that will be subject to owner liability as a result of the conversion is aware of and specifically consents to such liability.

23-1-38.5-11 Official comments

This section imposes no restrictions or limitations on the terms or conditions of an entity conversion, but sets forth the provisions that are required to be included in a plan of entity conversion. The list is not exhaustive and the plan may include any other provisions desired by the parties to the conversion. It is intended that the plan set forth the manner in which the capitalization of the surviving entity will be restructured and include the full text of the organic documents of the surviving entity. If a foreign entity will be the surviving entity, the laws of the foreign jurisdiction will govern the contents of the organic documents. For a permitted conversion of a foreign entity to a domestic entity, the laws of the foreign jurisdiction will govern which of the foregoing actions may be taken; however, the plan must also comply with the requirements of this section.

The plan of entity conversion is not required to be filed with the Secretary of State.

The 2006 amendments to this section clarified that the required contents of a plan of entity conversion apply to all of the permitted types of conversion.

23-1-38.5-12 Official comments

This section sets forth the procedures for adoption and approval of a plan of entity conversion by a domestic corporation to a domestic other entity or foreign other entity. The procedures set forth in this section generally follow the procedures for adoption and approval of a plan of merger or share exchange in IC 23-1-40-3. For a permitted conversion of a foreign entity, the plan of entity conversion must be adopted and approved in accordance with the laws of the foreign jurisdiction.

A plan of entity conversion must be adopted by the board of directors, even if the board determines that it should not make a recommendation to the shareholders because of conflicts of interest or other special circumstances. The plan of entity conversion must then be approved by the shareholders at a meeting at which there is a quorum present. Unless the corporation's articles of incorporation or the board of directors establish a higher threshold, the quorum is a majority of the votes entitled to be cast on the plan under IC 23-1-30-6(a). The plan of entity conversion will be approved if more votes are cast in favor of the plan than against it at a meeting at which a quorum is present.

If the corporation has more than one class or series of shares, approval of the plan of entity conversion requires the approval of each class or series voting as a separate voting group at a meeting at which there exists a quorum of each class or series. If a quorum is present, the plan will be approved if more votes are cast in favor of the plan than against it by each voting group entitled to vote on the plan under IC 23-1-30-6(c) and 23-1-30-7.

In lieu of a meeting, approval of the shareholders can be given by consent of the shareholders entitled to vote on the conversion under IC 23-1-29-4 and 23-1-29-4.5.

Subsection (7)

The purpose of subsection (7) is to ensure that any shareholder that will be subject to owner liability as a result of the conversion is aware of and specifically consents to such liability.

The 2006 amendment to this section eliminated the transition provision that was formerly subsection (7).

23-1-38.5-13 Official comments

The filing of articles of entity conversion make the conversion a matter of public record. Articles of entity conversion are required to be filed for all types of permitted conversions where the surviving entity will be a domestic entity. Subsections (a) through (e) set forth the required contents of each type of permitted conversion where the surviving entity will be a domestic entity. The articles of entity conversion may provide for a delayed effective date and will take effect as set forth in IC 23-1-18-4.

If the surviving entity will be a foreign entity, articles of charter surrender are required to be filed with the Secretary of State, as in IC 23-1-38.5-14.

The 2006 amendments to this section deleted former subsection (h), which required a foreign corporation converting to a foreign other entity to file articles of entity conversion with the Indiana Secretary of State. This amendment was intended to clarify that such conversions do not require filing of articles of entity conversion and it does not affect any requirements pursuant to other applicable law. In addition, the 2006 amendments updated the requirements for contents of the articles of entity conversion to make them consistent with the other amendments to this chapter.

Subsection (g)

If the converting entity is a foreign entity, Subsection (g) operates to automatically cancel the entity's certificate of authority.

23-1-38.5-14 Official comments

The filing of articles of charter surrender make the conversion of a domestic filing entity to a foreign entity a matter of public record. It also operates to terminate the status of the domestic filing entity as an entity existing under Indiana law. The articles of charter surrender may have a delayed effective time and will take effect as provided in IC 23-1-18-4.

The 2006 amendments to this section made the section generally applicable to all domestic filing entities and made the section consistent with IC 23-1-38.5-10(c).

23-1-38.5-15 Official comments

Subsection (a)

The phrase "in which the surviving entity is a domestic business corporation or domestic other entity" was added to clarify that this subsection does not apply to conversions in which the surviving entity is a foreign entity. The effects of such conversions are governed by the laws of the foreign jurisdiction.

Subsection (a)(7) was intended to clarify that where an entity has been converted under this section, the surviving entity shall, for all purposes of the laws of the state of Indiana, be deemed to be the same entity as the converting entity as it existed before the conversion. All of the rights, privileges, and powers of the converting entity and all property, real, personal, and mixed, and all debts due to such converting entity, as well as all other things and causes of action belonging to such converting entity, shall remain vested in the surviving entity (and thus shall not be deemed, as a consequence of the conversion, to have been "transferred" or "assigned" to the surviving entity). All rights of creditors and all liens upon any property of such converting entity shall be preserved and unimpaired and all debts, liabilities, and duties of the converting entity shall remain attached to the surviving entity and may be enforced against the surviving entity to the same extent as if said debts, liabilities, and duties had originally been incurred or contracted by it in its capacity as the surviving entity.

Subsection (a)(8) was added to clarify that a conversion is a continuation of the converting entity, unless the entity and/or its shareholders or interest holders have agreed otherwise. The other 2006 amendments to this subsection are consistent with the overall purpose of the 2006 amendments to this chapter making it generally applicable to conversions involving a domestic entity.

Subsection (b)

The phrase "if the shareholders or interest holders of the converting entity are entitled to receive dissenters' rights upon conversion" was added in lieu of the prior language to broaden the scope of this subsection to apply to all conversions where the shareholders or interest holders of the converting entities are entitled to receive dissenters' rights upon the happening of the conversion. The other 2006 amendments to this subsection are consistent with the overall purpose of the 2006 amendments to this chapter making it generally applicable to conversion involving a domestic entity.

Subsections (c) and (d)

The 2006 amendments to this subsection made it generally applicable to conversions involving a domestic entity.

23-1-38.5-16 Official comments

Unless otherwise provided in a plan of entity conversion, a domestic entity proposing to convert may abandon the transaction without shareholder or interest holder approval, even though it has been previously approved by the shareholders or interest holders. The 2006 amendments to this section made it generally applicable to conversions involving a domestic entity.

23-1-39-2 Official comments

(a) This section - which authorizes "supermajority" shareholder voting provisions to appear in the bylaws, if the articles of incorporation expressly so permit - follows the RMA except for deletion of the following sentence of RMA § 10.21:

The adoption or amendment of a bylaw that adds, changes, or deletes a greater quorum or voting requirement for shareholders must meet the same quorum requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirement then in effect or proposed to be adopted, whichever is greater.

Deletion of this RMA requirement that adoption or amendment of a "supermajority" bylaw provision requires the same supermajority vote is consistent with deletion of the same RMA requirement for supermajority articles provisions. *See* IC 23-1-30-8 and Official Comment.

If shareholders adopt a supermajority bylaw provision on shareholder voting, the board of directors may not alter or amend it. However, because the BCL, unlike the RMA, does not authorize shareholder adoption of bylaws at all unless the articles so authorize, *see* IC 23-1-39-1 and Official Comment, shareholders will have no power to adopt supermajority bylaw provisions unless the articles expressly authorize both (a) inclusion of supermajority voting provisions in the bylaws, and (b) shareholder authority to adopt bylaws in the first instance.

23-1-39-3 Official comments

In subsections (a) and (b), the words "than majority" were inserted between "greater" and "quorum or voting" to reflect the standard quorum and voting rules for action by the board of directors. *See* IC 23-1-34-5. In subsections (a), (b) and (c), the words "action by" were added before "board of directors" for clarity.

In subsection (a)(2), RMA language providing that a "supermajority" quorum or voting requirement adopted by the board of directors could be amended "by the shareholders" as well as the board was deleted, consistent with the BCL's general elimination of statutory shareholder authority to adopt, amend or repeal bylaws unless the articles of incorporation so authorize. *See* IC 23-1-39-1 and Official Comment.

23-1-40-1 Official comments

The GCA required a majority of all directors to approve a merger. *See* IC 23-1-5-2 (repealed 1986). The BCL requires approval only by a majority of the directors present at a meeting attended by a quorum. *See* IC 23-1-34-5(c).

23-1-40-2 Official comments

The acquiring corporation in a share exchange under IC 23-1-40-2 must acquire all of the shares of the class or series of shares that is being acquired. The shares of one or more other classes or series of the acquired corporation or other entity may be excluded from the share exchange or may be included on different bases.

Subsection (d) makes clear that the authorization of share exchange combinations under this section does not limit the power of corporations to acquire shares without using the share-exchange procedure, either as part of a corporate combination or otherwise.

IC 23-1-40-2 imposes virtually no restrictions or limitations on the terms or conditions of a share exchange. However, subsection (b)(2) requires that the terms and conditions be set forth in the plan of share exchange (*see also* Official Comments to IC 23-1-40-8(c)(4)(B) on the terms and conditions of a plan of merger, the principles of which apply likewise in the context of a share exchange). The list of required provisions in subsection (b) of required provisions in a plan of share exchange is not exhaustive and the plan may include any other provisions that may be desired.

23-1-40-3 Official comments

(d) The second "must" in the second sentence of subsection (d) was added for clarity.

(f) (1) Subsection (f)(1) grants class voting rights on a plan of merger if it contains a provision that would require class voting under IC 23-1-38-4. As noted in the Official Comment to that section, however, IC 23-1-38-4(a)(5)'s grant of class voting rights when the shares of all or part of a class are changed into a different number of shares of the same class does not create class voting rights on a conversion of shares into cash, *e.g.,* in a "cash-out merger."

(g) Subsection (g) details the requirements that must be met for a plan of merger not to require shareholder approval. In 1987, language was added to subdivision (2), which requires that such mergers not alter the pre-merger holdings of the surviving corporation's shareholders, to clarify that this rule speaks only to the *proportionate* holdings of pre-merger shareholders of the survivor, *in their capacity as such.*

This is best illustrated by example. Assume that before a proposed merger, shareholders A and B own all the shares of the corporation that will survive the merger, while B also owns shares of the non-survivor. The proposed merger would not alter the proportionate shareholdings of A and B with respect to their pre-merger holdings in the survivor, but would give B additional shares of the survivor in exchange for his shares of the non-survivor. The 1987 amendments to subdivision (2) make clear that B's receipt of additional shares of the survivor, due solely to the fact that he owned pre-merger shares of the non-survivor, does *not* require shareholder approval of the merger. This was the intent and effect of the subdivision even before the 1987 amendments, but the Commission believed the clarifying language would be helpful.

The 1987 amendments also added to subdivisions (3) and (4) the parenthetical phrase "adjusted to reflect any forward or reverse share split that occurs under the plan of merger," to clarify that the tests of these subdivisions address the effect of a proposed merger on proportionate, not absolute, pre and post-merger shareholdings.

The GCA provision authorizing certain mergers without shareholder approval applied only to corporations with 100 or more shareholders, and only if the merger effected an increase of no more than 15% in the pre-merger number of shares outstanding (rather than the 20% dilution limit established by subdivisions (3) and (4)). *See* IC 23-1-5-2(b) (repealed 1986).

(i) The GCA had no specific provision authorizing abandonment of a merger or share exchange, but did require that the board of directors reapprove the plan as soon as practicable after the expiration of thirty days from the date of shareholder approval. *See* IC 23-1-5-2(f) (repealed 1986). The BCL does not carry forward the GCA's "board reapproval" requirement, but permits the board to abandon the planned merger or share exchange, without further shareholder action, at any time before articles of merger or share exchange are filed.

23-1-40-5 Official comments

(c) Subsection (c) authorizes the filing of articles of merger with the county recorder when the merger results in change of title to real estate in that county (whether due to a transfer from the non-survivor to the survivor or simply a change in the name of the surviving corporation). This subsection has no RMA counterpart.

The GCA required, as the mandatory and statutorily prescribed method for transferring title to real estate as a result of a merger, that a duplicate certificate of merger, certified by the Secretary of State, be filed with the county recorder in each county in which such real estate was located. The BCL provision is somewhat simpler (requiring only a file-stamped, not a certified, copy of the articles of merger). Also, like the BCL's similar procedures for altering real estate records when a corporation simply changes its name, *see* IC 23-1-38-6(b) and Official Comment, subsection (c) is expressly permissive, and any failure to file in a county recorder's office does not affect the "validity of the merger or the change in corporate name" effected by the merger. Here, as in the simple corporate name change context, the Commission anticipated that county real estate records would normally be altered prior to any conveyance to reflect the current corporate ownership - whether by the permissive filings authorized by this subsection or by some other means of notification satisfactory to a county recorder - and saw no reason to require such filings at any particular time before a conveyance.

23-1-40-8 Official comments

Subsection (c) authorizes mergers between one or more domestic corporations and one or more foreign corporations or domestic or foreign other business entities. Subsection (d) authorizes mergers between one or more domestic other business entities and one or more foreign other business entities.

Whether and on what terms a foreign corporation or a foreign other entity is authorized to merge with a domestic corporation is a matter that is governed by the laws under which that corporation or other entity is organized or by which it is governed, rather than those of this chapter.

Although this Chapter imposes virtually no restrictions or limitations on the terms or conditions of a merger, subsections (c)(4)(B) and (d)(3)(B) require that the terms and conditions of the merger be set forth in the plan of merger. *See* IC 23-1-40-1(b)(2).

23-1-41-2 Official comments

(a) *See* IC 23-1-41-1(a) and Official Comment for a comparison with GCA rules.

(d) The second "must" was added in the second sentence of subsection (d) for clarity.

23-1-42-1 Official comments

Section 1 defines "control shares" as shares that, when added to an acquiring person's pre-acquisition voting power, would (but for the rules of the Chapter) put that person over any of three thresholds of voting power in the election of directors of "an issuing public corporation" - one-fifth, one-third or a majority.

The thresholds were not selected arbitrarily. One-fifth (or 20%) is the level of ownership considered significant enough, under equity accounting rules, to permit a corporation to report the results of its investment in another corporation as a line item on its financial statements. It also represents a significant level of dominance that, in a public corporation in which other shareholdings are generally dispersed, can amount to effective control for many purposes. The Commission believed that the second threshold, one-third, is generally recognized as a sufficient block of shares to constitute effective control of such a corporation for most if not all practical purposes. A majority or more of voting power is, of course, literal control. Though the Commission believed these thresholds were appropriate for the purposes of the Control Share Acquisitions Chapter, different thresholds of control can be equally appropriate in other contexts. *See, e.g.,* IC 23-1-43-8(b) and Official Comment (10% threshold for purposes of Business Combinations Chapter); 15 U.S.C. § 78p(a) (10% threshold for short-swing profits rule of section 16a of the Securities Exchange Act).

Since the definition of "control shares" is tied to whether such shares would, but for the rules of Chapter 42, put an acquiring person over one of the three statutory thresholds of voting power, such shares will cease to be "control shares" in the hands of a subsequent owner who thereafter obtains them from the acquiring person (unless their acquisition by that subsequent owner would itself constitute a "control share acquisition" by that subsequent owner). Hence, even if an acquiring person's "control shares" are not granted voting power by disinterested shareholders under IC 23-1-42-9, such shares will have voting power if thereafter obtained from the acquiring person by a subsequent owner for whom the shares do not constitute "control shares." *See* IC 23-1-42-5 & -9 and Official Comments.

"Control shares" are *not* "all shares" owned by the acquiring person, but only the shares acquired in the "control share acquisition" (which can be acquired in separate purchases over a considerable period of time, *see* IC 23-1-42-2) that, when added to the acquiring person's pre-acquisition holdings, put the person over one of the three specified thresholds of voting power. The facts in *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69 (1987), are illustrative. The acquiring person in *CTS* owned approximately 9.6% of the issuing public corporation's shares before the acquisition, and then acquired approximately 17.9% in a tender offer, giving it a total of about 27.5%. *CTS,* 481 U.S. at 75. Only the 17.9% acquired in the tender offer - which put the acquirer over the one-fifth threshold - were "control shares" whose voting power would be determined, under IC 23-1-42-9, by a vote of the disinterested shareholders.

In a shareholder vote on the voting power of the "control shares," however, *none* of the acquiring person's shares (*i.e.* both its shares owned before the acquisition and the "control shares") are permitted to vote. *See* IC 23-1-42-3 and Official Comment. Hence, in the *CTS* example, the shareholder vote (which the acquiring person in *CTS* lost after the United States Supreme Court decision) determined the voting power only of the 17.9% that were "control shares"; but none of the acquiring person's shares (*i.e.,* both the 17.9% "control shares" and the 9.6% previously owned) were permitted to vote on the voting power issue.

Section 1 provides that "voting power" under the Chapter means "voting power ... in the election of directors." Under the BCL, shares may have either unlimited voting power or "special, conditional, or limited voting rights, or no right to vote, except to the extent prohibited by this article." IC 23-1-25-1(c)(1). Whatever other voting or other rights shares may have, however, if they have voting power "in the election of directors" their acquisition in sufficient amounts will make them "control shares" subject to the Chapter's rules.

Section 1 also includes several provisions that make it clear that a person's acquisition of substantive ability to control the voting power over the requisite percentages of shares, and not mere formal, record ownership, is the key to determining whether the shares are "control shares." Thus, the section counts both shares "owned by a person" and shares "in respect to which that person may exercise or direct the exercise of voting power," thereby covering, for example, shares owned by a subsidiary of the acquiring person, or shares that are owned by an unrelated person but as to which the acquiring person has contractual rights to direct their voting. Similarly, the acquisition of control shares may be "directly or indirectly, alone or as part of a group," meaning that the legal form of the acquisition, or whether the acquisition is made by one person or by two or more persons acting cooperatively or in concert, will not affect application of the Chapter. This is similar to the "group" approach adopted by the Securities and Exchange Commission under the Securities Exchange Act of 1934. *See* Reg. 13d-5, 17 C.F.R. § 240.13d-5.

These examples are illustrative, not exhaustive. In each case, the relevant inquiry is whether one or more acquiring persons have acquired sufficient practical ability in fact "to exercise or direct the exercise of the voting power of the issuing public corporation" within the statutory ranges, and not simply whether a single person acquires actual record ownership of a certain percentage of shares.

"Person," as used in this section and elsewhere in the Chapter, has the same meaning it has throughout the BCL under IC 23-1-20-18, "individual or entity."

23-1-42-2 Official comments

(a) A "control share acquisition" is defined simply as the direct or indirect acquisition of ownership of, or the power to direct the exercise of voting power with respect to, issued and outstanding "control shares."

As noted in the Official Comment to IC 23-1-42-1, the key is not simply whether a single person acquires actual record ownership of a sufficient percentage of shares with voting power in the election of directors: Any transaction or series of transactions under which a person, or a group of persons acting together, acquires the substantive practical ability to vote or direct the exercise of voting power within the ranges specified in IC 23-1-42-1, directly or indirectly, individually or collectively, will constitute a "control share acquisition" under the Chapter, whatever the form of the transactions or the formal ownership of the shares.

Because "control share acquisition" is defined as the acquisition of already "issued and outstanding" control shares, a person's acquisition from the corporation itself of shares that were previously not issued or outstanding (such as newly authorized shares, or treasury shares being reissued) will not constitute a "control share acquisition," even if the acquisition puts that person over one of the IC 23-1-42-1's three thresholds of voting power. However, that person's acquisition of the same number of shares in a public offering (rather than directly from the corporation) *would* constitute a "control share acquisition," since the shares will already have been "issued" (to an underwriter) before being acquired by that person.

Recognizing that a control share acquisition need not take place on a single day or as part of a single transaction, subsection (b) establishes a conclusive presumption that shares acquired during any 90-day period are deemed "to have been acquired in the same acquisition." Hence, a person that owns 5% of an issuing public corporation's shares and then acquires an additional 16% during a 90-day period has made a "control share acquisition," regardless of the number of separate purchases or the precise dates during that period on which particular purchases (or other forms of acquisition of the substantive ability to exercise or direct the exercise of voting power) took place.

The fact that the acquisition takes place over a period longer than 90-days does not, however, establish any contrary presumption that a "control share acquisition" has *not* been made. Any acquisition of the substantive ability to exercise or direct the exercise of sufficient voting power, if made "pursuant to a plan to make a control share acquisition," will be deemed to have been made in the same acquisition. To use the simplest example, a 5% owner who intends to acquire a total of 21% of the voting power of an issuing public corporation cannot avoid application of the Chapter by acquiring an additional 14% of the shares on day 1 the final 2% 91 days later. The attempted evasion need not, however, be this obvious. Whether a "plan to make a control share acquisition" exists with respect to purchases made over a longer than 90-day period will be a question of fact that, like any other such question, may be proved or rebutted by any relevant direct or circumstantial evidence. And if such a plan does exist, all acquisitions made pursuant to the plan will be deemed part of the same "control share acquisition." Thus, in the example just used, the entire additional 16% of the shares obtained, and not just the final 2%, would be "control shares" under Chapter 42.

(c) Subsection (c) excludes from the definition of "control share acquisition" acquisitions made by persons, such as brokers or nominees, who acquire shares for the benefit of others in the ordinary course of business, so long as (1) the acquisition is made "in good faith and not for the purpose of circumventing this chapter," and (2) the acquirer is not "able to exercise or direct the exercise of votes without further instructions from others" (typically, the beneficial owner). The subsection thus avoids application of the Chapter in situations where, as part of normal commercial practices, record ownership of shares may be concentrated in a given broker or nominee but actual voting power with respect to the shares remains dispersed.

If, however, voting power not subject to instruction or direction from beneficial owners is in fact concentrated in the broker or nominee, subsection (c)'s exception does not apply. Also, the exception cannot be used to circumvent the Chapter for example, where a broker's purchases for his clients are in fact being made in concert with, and as part of an effort to assist, an acquiring person's plans to obtain effective voting power within the ranges covered by the statute.

(d) Subsection (d) sets forth additional exceptions to application of the Chapter. Subdivisions (1) and (2) exempt share acquisitions made before, or pursuant to a contract to acquire such shares existing before January 8, 1986, the date the BCL legislation was introduced in the General Assembly. The Commission believed it equitable to have the new internal governance rules on control share voting power apply only to acquisitions occurring after it was public record that those rules were being considered.

Subdivision (3) exempts shares acquired pursuant to the laws of descent and distribution. Acquisition of shares in this fashion will usually not alter that basic pattern of concentration of voting power in a corporation; and only in very extraordinary circumstances could this be the means by which an acquiring person would plan, in the Indiana corporations with 100 or more shareholders covered by the Chapter (*see* IC 23-1-42-4(a)), to achieve increased voting power within the ranges covered by the Chapter.

Subdivision (4) exempts shares acquired in satisfaction of a pledge or security interest created in good faith and not for the purpose of circumventing the Chapter. Since such pledges will normally be made by one or a relatively small number of shareholders who already own shares within one of the ranges of voting power covered by the Chapter, foreclosure of the pledge will normally effect no fundamental change in the pattern of concentration of voting power. The pledge must have been made, however, "in good faith and not for the purpose of circumventing this chapter." For example, an acquiring person cannot evade the Chapter by having selling shareholders make sham "pledges" that are then foreclosed upon to vest title or voting power in the acquirer.

Subdivision (5) exempts shares acquired pursuant to mergers or share exchanges under IC 23-1-40 if the issuing public corporation is a party to the merger agreement or plan of share exchange. A share acquisition by one of these means will either already have been approved by the shareholders, *see* IC 23-1-40-1(a) & -(2)(a), or meet one of the statutory exceptions to the shareholder approval requirement, *see* IC 23-1-40-3(g) (short-form mergers); IC 23-1-40-4 (parent-subsidiary mergers). Such an acquisition will also have been negotiated with and approved in advance by the board of directors of the issuing public corporation.

(e) Subsection (e) permits a person whose control shares have already been granted voting power by disinterested shareholders, or whose acquisition of control shares would have been a control share acquisition, but for subsection (d), to transfer those shares with voting power intact to another person who is acquiring them in good faith and not for the purpose of circumventing the Chapter, unless the transfer would give the acquirer voting power in excess of the threshold previously authorized. For example, a person that previously had voting power approved in the one-fifth-to-one-third range of voting power may transfer its shares with voting power to another person, unless the transferred shares would, when added to the second person's existing voting power, give the second person voting power in the one-third-to-one-half or the majority-or-more range. If, however, the transfer simply gives the second person somewhat greater voting power within the range previously approved for the first person (*e.g.*, 27% instead of 22%) it is not a control share acquisition by the second person.

Subsection (e) was included because such transfers generally will not, unless they push the second person over a higher threshold of voting power than that already authorized for the first person, significantly alter the existing pattern of voting power concentration in the corporation. The subsection may not be used, however, to circumvent the Chapter - for example, as part of a plan under which a first person, to whom disinterested shareholders are willing to grant voting power, intends to transfer the shares to a second person (such as a notorious corporate raider) whose efforts to obtain voting power for the shares would have been rejected.

23-1-42-3 Official comments

Section 3 defines "interested shares" for the purpose of identifying which shares will not be permitted to vote, under IC 23-1-42-9(b)(2), on whether an acquirer's control shares will be granted voting rights. "Interested shares" are those owned by, or the voting power of which is exercised or directed by, (1) the acquiring person or any member of a group with respect to a control share acquisition, (2) an officer of the issuing public corporation, or (3) an employee of the corporation who is also a director. An acquiring person's "interested shares" include both any "control shares" acquired in the "control share acquisition" and any shares it owned prior to the acquisition, none of which may be voted under IC 23-1-42-9(b)(2) in determining whether the control shares will have voting rights. The fact that pre-acquisition shares are "interested shares" for this purpose does not, however, affect the voting power of those shares in any other context. *See* IC 23-1-42-1 and Official Comment.

The Chapter excludes shares owned by any of the foregoing persons from voting under IC 23-1-42-9(b)(2) on whether to grant voting rights to control shares because the Commission believed that approval of this potentially fundamental change in the nature of the corporation should rest with shareholders other than those whose interest in the acquisition may involve factors unrelated to the best interests of the corporation. The acquiring person may obviously have such unrelated interests. Officers and "inside" directors may also have other interests that may be threatened by the acquisition, such as preserving their positions with the corporation (the so-called "entrenched management" theory). However, shares owned or voted under the control of non-employee (or "outside") directors are *not*" interested shares" under the Chapter, since the acquisition does not even theoretically threaten any employment position for such directors. The fact that shares owned by the acquirer and shares owned by "inside" management are both prohibited from voting on whether the "control shares" will be granted voting rights is among the reasons that the United States Supreme Court held, in *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69 (1987), that the Chapter "protects the independent shareholder against both of the competing parties," and thus "furthers a basic purpose of the Williams Act."

The critical inquiry in determining whether shares are "interested shares" is who has the ultimate power to exercise or direct the exercise of the voting power of the shares on the date in question. For example, shares do not become "interested shares" simply because the owner grants a revocable proxy covering the shares to an officer or an employee-director of the corporation. In that case, the beneficial owner, rather than the proxy holder, retains ultimate control over the exercise of the voting power of the shares.

Similarly, if the acquiring person has purchased shares after the record date for the meeting, those shares will not be "interested shares" (unless an irrevocable proxy has been given to the acquirer) because voting power will rest with the record owner. The United States Supreme Court noted this point in *CTS* 481 U.S. at 74 n. 2.

If the record date passes before the acquiror purchases shares pursuant to the tender offer, the purchased shares will not be "interested shares" within the meaning of the Act; although the acquiror may own the shares on the date of the meeting, it will not "exercise ... the voting power" of the shares.

This point has added importance in light of the fact that the BCL does not carry forward the GCA rule, *see* IC 23-1-2-9(e)(repealed 1986), entitling a person who acquired title to a share after a record date has passed to receive, on written request to the record shareholder from whom the share was acquired, a proxy to vote that share. *See* Official Comment to IC 23-1-29-7(a).

23-1-42-4 Official comments

(a) Subsection (a) defines which corporations are "issuing public corporations" subject to the Chapter. The first requirement is that the corporation be an Indiana corporation subject to the BCL, since the term "corporation" used in this subsection is defined for purposes of the entire BCL as "a corporation for profit that is not a foreign corporation, incorporated under or subject to the provisions of this article," IC 23-1-20-5. This rather obvious point merits emphasis because the Federal District Court in the *Dynamics Corp. of America v. CTS Corp.* case mistakenly found, as one basis for its holding that the Chapter violated the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, that the Chapter could be applied to non-Indiana corporations. This misreading was rejected by the Court of Appeals and not even discussed by the United States Supreme Court, which properly interpreted the statute as applying to Indiana corporations only. *See Dynamics Corp. of America v. CTS Corp.,* 637 F. Supp. 389, 402-03 (N.D. Ill. 1986), *aff'd on other grounds*, 794 F.2d 250, 260 (7th Cir. 1986), *rev'd*, 481 U.S. 69 (1987).

Subdivision (1) requires that the corporation have at least 100 shareholders. This requirement limits the Chapter's application to corporations in which share ownership is fairly dispersed, since it is precisely in such corporations that changes in the concentration of voting power within the ranges covered by the Chapter will constitute the kind of fundamental change in the nature of the corporation that the Commission thought it appropriate to submit to a vote of disinterested shareholders. As a practical matter, the shares of most (if not all) such corporations will be publicly traded; but this is not itself a definitional requirement under the Chapter.

Subdivision (2) requires that an issuing public corporation have its principal place of business, principal office or substantial assets in Indiana, and subdivision (3) requires that such a corporation have either 10% of its shareholders resident in Indiana, 10% of its shares owned by Indiana residents, or 10,000 shareholders resident in Indiana. Hence, these two subdivisions require that an issuing public corporation have substantial ties to Indiana in addition to being incorporated in Indiana. The United States Supreme Court, in *CTS Corp.* noted these requirements in holding that Indiana had a legitimate interest in establishing the Chapter's corporate governance rules for the "issuing public corporations" covered by the Chapter. 481 U.S. at 74, 87. It is unclear whether this factor was considered dispositive by one or more members of the *CTS* majority. However, the Supreme Court's discussion of the requirements of substantial ties to the state - coupled with its discussion of the absence of similar requirements in the Illinois change-of-control statute (concededly much different from Chapter 42) struck down in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) - raises some question whether a control share statute that applied to any corporation chartered under a state's law, regardless of other ties to the state, would be upheld.

In determining whether a corporation meets the "100 shareholder" test of subdivision (1), or one of the alternative "Indiana shareholders" tests of subdivision (3), each person who is a participant in an employee stock ownership or similar plan will be considered a shareholder if the ultimate control over voting of the shares held by the plan rests with the participants. This is consistent with Chapter 42's focus in other contexts on the ability to exercise or direct the exercise of voting power over shares. *See* IC 23-1-42-1 & -3 and Official Comments.

Subsection (a)'s definitional requirements for an "issuing public corporation" are of course judged at the commencement, rather than the completion, of a control share acquisition. An acquiring person cannot use the control share acquisition itself as a device for attempted avoidance of the Chapter's rules - for example, by buying out enough shareholders so that the corporation has fewer than 100 shareholders, or fewer than 10% of its shareholders resident in Indiana, after the acquisition is completed. If the "issuing public corporation" in this example had more than 100 shareholders and more than 10% of its shareholders resident in Indiana before the acquisition, the Chapter applies. The same is true with respect to any other change in whether the corporation meets any of the definitional criteria of subsection (a) that might be caused by the control share acquisition itself.

(b) Subsection (b) establishes a conclusive presumption, for purposes of determining whether a corporation meets any of the three alternative "Indiana shareholder" requirements of subsection (a)(3), that a shareholder's residence is the address shown on the books of the corporation. This is consistent with IC 23-1-20-29(c), which provides that written notice to a shareholder "is effective when mailed, if correctly addressed to the shareholder's address shown in the corporation's current record of shareholders."

(c) Subsection (c) provides that "[s]hares held by banks (except as trustee or guardian), brokers or nominees shall be disregarded for purposes of calculating the percentages or numbers" that determine whether an Indiana corporation is an "issuing public corporation" subject to the Chapter. This exclusion of institutional holdings, which is based on the fact the residence of the beneficial owners of such shares cannot easily or readily be determined, can operate both to include and exclude corporations from the definition of "issuing public corporation." For example, a corporation that has more than 100 total shareholders, but fewer than 100 who are not banks, brokers or nominees, will not be covered by the Chapter. Conversely, if a corporation has fewer than 10% of its total shares owned by Indiana residents, but Indiana residents own more than 10% of that portion of the corporation's shares not held by banks, brokers or nominees, the corporation will be covered by the Chapter.

23-1-42-5 Official comments

Section 5, together with IC 23-1-42-9, sets forth the basic operational provision of the Chapter that control shares will have only such voting rights as are granted by the shareholders. Hence, whatever voting rights the shares had before an acquiring person obtained them in a control share acquisition, the shares will have no post-acquisition voting rights in the hands of the acquirer unless disinterested shareholders, voting as a group, approve such rights. Even if the disinterested shareholders do not approve such voting rights for the acquirer, however, the shares will cease to be "control shares," and will have voting rights in the hands of a subsequent owner who thereafter obtains them from the acquiring person unless their acquisition by the subsequent owner itself constitutes a "control share acquisition" by that person. *See* IC 23-1-42-1 and Official Comment.

The effect of this rule is to greatly increase the protection of dispersed shareholders when a prospective acquirer seeks to obtain a dominant position in the corporation. This is illustrated by the fairly common change-of-control scenario of a partial tender offer, in which the acquirer offers to buy only a portion of the outstanding shares - presumably just enough, in the acquirer's judgment, to give it effective control of the corporation. In this situation (precisely the factual context of *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69 (1987)), a bidder will typically offer some premium over the current market price of the shares, but less than the real "control premium" it would have to pay if it were either purchasing all the shares or buying the partial interest in a block from a single shareholder.

The strategy often works because the small shareholder, absent the protections of the Control Share Acquisition Chapter, can only respond to the offer individually and is inherently coerced into tendering his shares to the bidder. If he does not tender, he will realize no premium whatsoever on his investment, and will be left as a small investor in a much different corporation - namely, one that is now controlled by a dominant shareholder who has no plans or obligation to "take him out" and who can operate the corporation for its benefit. But since all other individual shareholders go through the same calculus, they too will tender (along with any institutional investors, who for a variety of reasons will typically be interested in accepting any short-term profit on their holdings). The result is that the offer will be oversubscribed, with everyone realizing some premium (though less than a full "control premium") on a portion of his shares and everyone also left holding most of his shares in a corporation that has been altered as radically, but without any shareholder vote, as if there had been a merger with the acquirer. A thorough discussion of such coercive effects is found in Bebchuk, *Toward Undistorted Choice* and *Equal Treatment in Corporate Takeovers,* 98 HARV. L. REV. 1693 (1985).

The Control Share Acquisitions Chapter shifts these dynamics in favor of the dispersed individual shareholders by forcing an acquirer to deal with them collectively. In general, the acquirer must either: (1) negotiate a merger or share exchange (which will not be subject to the Chapter itself, *see* IC 23-1-42-2(d)(5), but will in most instances require shareholder approval under IC 23-1-40-1); (2) make an offer sufficiently favorable that the shareholders acting collectively will grant voting power to the control shares under IC 23-1-42-9; or (3) negotiate the acquisition with the board of directors before acquiring the control shares.

The third choice is possible because section 5 gives an "issuing public corporation" that would otherwise be subject to the Chapter the option, either in its articles of incorporation or bylaws, to elect not to be governed by the Chapter, *if* the election is made *before* the "control share acquisition." As a practical matter, this will encourage an acquirer that does not plan a merger or share exchange and that wants to ensure that its control shares will have voting power, to negotiate the terms of the proposed acquisition with the shareholders' elected representatives on the board of directors *before* it acquires a potentially coercive block of shares that could distort the results of the negotiations. Following successful negotiations and before the acquisition is made, the articles or bylaws can be amended to provide that the corporation is not subject to Chapter 42. (Section 5's rule that a corporation must make its election whether to be governed by the Chapter *before* a control share acquisition also protects an acquirer who has already made such an acquisition from retroactive application of the Chapter's provisions.)

The fact that otherwise covered Indiana corporations are given the option of whether to be governed by the Chapter also raises an interesting constitutional question that, in light of the United States Supreme Court decision in *CTS*, does not need to be resolved with respect to the Chapter itself. In effect, section 5's "opt out" provision makes the Chapter, for all practical purposes, a legislative authorization of corporate charter provisions that corporations may adopt, but are not obligated by the State to do so. Accordingly, the Commission believes, as was argued in *CTS*, that actual application of the Chapter in any given case constitutes private corporate action not subject to constitutional challenge under either the Supremacy or Commerce Clauses of the United States Constitution. *See* IC 23-1-22-4 and Official Comment. In *CTS*, however, the Supreme Court upheld the Chapter as a constitutionally valid direct exercise of state authority, and expressly reserved comment on the "private action, not state action" issue. *See* 481 U.S. at 94 n. 14 (1987).

23-1-42-6 Official comments

Section 6 authorizes an acquiring person to deliver to the issuing public corporation an "acquiring person statement" setting forth the information specified in the section. Whether to deliver such a statement is expressly optional with the acquiring person. Similarly, the statement may be delivered before or after the control share acquisition.

If delivered before the acquisition, however, it must include both "a description in reasonable detail of the terms" of the proposed acquisition and the acquiring person's representations (along with "a statement in reasonable detail of the facts" supporting the representations) that (A) the acquisition will not be contrary to law and (B) the acquirer has "the financial capacity" to make the acquisition. Part of the requisite "financial capacity" is the ability to pay dissenters - either under Chapter 44 (since IC 23-1-44-8(a)(4) provides dissenters' rights on approval of any control share acquisition), or under IC 23-1-42-11 (which establishes special dissenters' rights, with a special definition of "fair value," when control shares giving the acquirer a majority or more of the voting power of the corporation are accorded "full voting rights"). If, however, the issuing public corporation is subject to Chapter 44's "market exception" to dissenters' rights, *see* IC 23-1-44-8(b) and Official Comment, there will not be dissenters' rights unless the acquisition is one that would create the special dissenters' rights of IC 23-1-42-11.

Section 6's additional requirements for pre-acquisition acquiring person statements are included because shareholders will want to consider these matters if asked to make a decision on voting rights for the control shares in advance of the acquisition. In addition, the requirements make it far more difficult (and far more dangerous, from an anti-fraud compliance standpoint) for a person that in fact has no serious acquisition plans to attempt to "put a company in play" simply by delivering an acquiring person statement.

The delivery *vel non* of an acquiring person statement, whether pre- or post-acquisition, has a number of practical effects under other sections of the Chapter. Under IC 23-1-42-7, delivery of such a statement is prerequisite to the acquiring person's right to request an early, special meeting of the shareholders for a determination of whether the control shares will be granted voting rights. Under IC 23-1-42-8(b)(1), the statement must be included with the notice of any shareholders' meeting at which the voting rights issue will be considered; hence, by delivery of a statement an acquiring person can ensure that its views on the acquisition are communicated to the shareholders. Finally, delivery of an acquiring person statement will cut-off any mandatory redemption of the control shares by the corporation under IC 23-1-42-10, unless the shares are not accorded "full voting rights" by disinterested shareholders.

The filing of an acquiring person statement will have none of these effects, however, unless the statement complies with all requirements of section 6.

23-1-42-7 Official comments

(a) Subsection (a) permits an acquiring person to request, upon the delivery to the issuing public corporation of an acquiring person statement under IC 23-1-42-6, a special shareholders' meeting to consider the voting rights to be granted to the control shares. The meeting request must be made at the time the statement is delivered. The acquiring person must also deliver, within ten days of the demand, a *bona fide* undertaking to pay the expenses of the special meeting and the undertaking must be a genuine one that the acquiring person in fact has the financial where-withall to honor. Like the acquiring person statement itself, however, the accompanying request for a special meeting may be made before or after shares have been acquired in the control share acquisition.

(b) Subsection (b) requires that the special meeting, if properly requested by the acquiring person, must be held within 50 days of the meeting request unless the acquiring person agrees in writing to a different date. Thus, an acquiring person can force a special meeting under this section to take place sooner than shareholders can normally force a special meeting under the BCL. *See* IC 23-1-29-2(a)(2) & -3(2)(A) (holders of 25% of voting power may demand a special shareholders' meeting, but may not seek a judicial order compelling the meeting unless notice was not given within 60 days of the demand).

The United States Supreme Court, in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), rejected the holdings of the Federal District Court and Court of Appeals, *see* 637 F. Supp. 389, 397 (N.D. Ill. 1986), *and* 794 F.2d 250, 261 (7th Cir. 1986), that subsection (b) effectively imposed a "50-day delay" on tender offers that conflicted with and was preempted by the Williams Act, under which a tender offer is required to remain open for a minimum of 20 business (*circa* 28 calendar) days. The Supreme Court noted that a tender offeror can comply with both Federal and Indiana law that the 50-day period in which a meeting must be held under the Chapter was within the 60-day period after which tendering shareholders must be granted withdrawal rights under the Williams Act, *see* 15 U.S.C. § 78n(d)(5); and that the Chapter's 50-day period was in marked contrast to the "indefinite delay" possible under the Illinois takeover statute struck down in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). *See CTS*, 481 U.S. at 78-83.

(c) Subsection (c) provides simply that, if the acquiring person makes no request (or an improper request) for a special meeting, the voting rights to be accorded the control shares will be decided at the next special or annual shareholders' meeting, whichever occurs first. Thus, the subsection thus ensures that the issue will be presented to shareholders at the next available opportunity even if an acquiring person does not deliver an acquiring person statement and request a special meeting, or delivers an improper statement with its meeting request.

The subsection - together with the fact that subsection (a) authorizes only a single request for a special meeting by an acquiring person, which may be delivered on one occasion only - also makes it clear that the voting rights of the control shares will be conclusively determined at a single meeting. Nothing in the Chapter authorizes more than one vote on whether to grant voting rights to the control shares and there is no authority for any acquiring person who loses that vote to seek to raise the issue again after the vote has occurred. Conversely, if voting rights are granted to control shares at a meeting, those rights cannot be eliminated at a subsequent meeting. *See* IC 23-1-42-9(b) and Official Comment.

(d) Subsection (d) gives the acquiring person the right to demand, which must be done at the time the acquiring person statement is delivered, that a requested special meeting be held no sooner than 30 days after the corporation's receipt of the acquiring person statement. Under IC 23-1-42-7, the normal minimum notice requirement for a shareholders' meeting is ten days.

Subsection (d) in effect allows the acquiring person to expand the minimum notice requirement for purposes of the Chapter, which it may wish to do if it is concerned that an earlier meeting will be poorly attended or not give shareholders sufficient time to consider the merits of the control share acquisition.

23-1-42-8 Official comments

(a) Under subsection (a), notice of a special meeting that has been requested by the acquiring person under IC 23-1-42-7 must be given by the issuing public corporation "as promptly as reasonably practicable" to all shareholders of record, "whether or not entitled to vote at the meeting."

The record date for the meeting will be determined under the record date provisions of the BCL - *i.e.,* either the date fixed by the bylaws or the board of directors (IC 23-1-29-7) or, if not fixed under that section, "the close of business on the day before the first notice is delivered to shareholders." IC 23-1-29-5(d). If an acquirer purchases shares after the record date and does not obtain an irrevocable proxy from the record owner of the shares, the shares will not become "interested shares" under IC 23-1-42-3 because voting power will remain with the record owner. *See CTS Corp. v. Dynamics Corp. of America,* 481 U.S.69-74, n. 2 (1987); Official Comment to IC 23-1-42-3.

The requirement that shareholders not entitled to vote be given notice of a special meeting if it is requested by the acquiring person is one of the specific statutory exceptions to the general rule of IC 23-1-29-5(a) that only shareholders entitled to vote must be given notice of annual or special meetings. The reference to nonvoting shareholders also makes it clear that only voting disinterested shareholders, not all disinterested shareholders, are entitled to vote on whether to grant voting power to an acquiring person's control shares. The Chapter does not require, however, that nonvoting shareholders be given notice if the acquiring person does not request a special meeting and the voting rights issue is therefore presented, pursuant to IC 23-1-42-7(c), at the next special or annual meeting.

(b) Subsection (b) requires that the notice of any meeting at which voting rights for control shares will be considered must include or be accompanied by (1) an acquiring person statement delivered to the corporation, and (2) a statement, authorized by the board of directors, of the board's position or recommendation, or that it is making no recommendation, with respect to the proposed acquisition. The first requirement ensures that the acquiring person's views as expressed in its acquiring person statement (if it has exercised its option to deliver such a statement) will be communicated to the shareholders. The second requirement permits the issuing public corporation to express its own views on the proposed acquisition and prevents the board of directors of the corporation from remaining silent about the acquisition. Both requirements are consistent with the shareholder protection purposes of the Chapter and reflect the Chapter's evenhanded approach to the potentially differing interests of the acquiring person and the current directors of the corporation.

Because approval of any control share acquisition creates dissenters' rights under IC 23-1-44-8(a)(4), the notice must also include the statements about dissenters' rights required by IC 23-1-44-10 (unless Chapter 44 dissenters' rights are not available because the issuing public corporation is subject to IC 23-1-44-8(b)'s "market exception" for dissenters' rights under that Chapter). The meeting notice is *not required, however, to include a description of any special dissenters' rights that approval of the acquisition may create under IC 23-1-42-11, since that section contemplates post-meeting notice of such special rights.* While the corporation may, if it wishes, may include a description of IC 23-1-42-11's special dissenters' rights in its notice or proxy statement, inclusion of such a description will *not* make the availability of such rights contingent on shareholder compliance with the pre-meeting shareholder notice rules established by IC 23-1-44-11 for dissenters' rights under Chapter 44. *See* IC 23-1-42-11 and Official Comment.

23-1-42-9 Official comments

(a) This subsection, together with IC 23-1-42-5, sets forth the basic operative provision of the Control Share Acquisitions Chapter - that "control shares" will have voting power in the hands of the acquiring person only "to the extent granted by resolution approved by the shareholders of the issuing public corporation." Some of the practical effects of this provision and the way it furthers the shareholder protection purposes of the Chapter are discussed in the Official Comment to IC 23-1-42-5. Even if the disinterested shareholders do not approve such voting rights for the acquirer, however, the shares will cease to be "control shares," and will have voting rights in the hands of a subsequent owner who thereafter obtains them from the acquiring person unless their acquisition by the subsequent owner itself constitutes a "control share acquisition" by that person. *See* IC 23-1-42-1 and Official Comment.

The language "to the extent granted" makes clear that the shareholders are *not* required to make a simple "yes/no" decision on whether the control shares will have "full" voting rights. Rather, the shareholders have the same flexibility in determining what voting rights will be granted that the BCL grants corporations generally with respect to voting rights *i.e.,* shares may have either unlimited voting power or "special, conditional, or limited voting rights, or no right to vote, except to the extent prohibited by this article." IC 23-1-25-1(c)(1). Because IC 23-1-42-10(b) permits redemption of control shares that are not accorded "full voting rights," it also demonstrates that the shareholders have flexibility as to the kind and extent of voting rights they choose to grant such shares and establishes one of the practical consequences if anything other than "full" voting rights are granted. But nothing in Chapter 42 prevents an acquiring person from conditioning its consummation of a proposed acquisition on the granting of full voting rights to the control shares it acquires.

(b) Subsection (b) sets forth the specific vote or votes, depending on the circumstances, that must be taken to approve a resolution granting voting rights to control shares. In regards to whether one or two approval votes is required, however, the subsection contemplates that whether the control shares will be granted voting rights will be conclusively determined at a single meeting; it does not authorize reconsideration of the issue - whether voting rights were granted or denied - by repeated votes or reintroduction of the issue at subsequent meetings. *See also* IC 23-1-42-7(c) and Official Comment.

The vote required by subdivision (2), approval by each voting group by a majority of all votes entitled to be cast by that group, "excluding all interested shares", is the basic vote that must be taken in every control share acquisition. Thus, a majority of shares held by shareholders other than (a) the acquiring person (including both its "control shares" and any pre-acquisition shares), (b) officers of the issuing public corporation, and (c) employees of the corporation who are also directors, *see* IC 23-1-42-3 and Official Comment, must always be obtained to approve any grant of voting rights to control shares.

An additional vote - in which the voting rights resolution must be approved separately by each voting group by a majority of all votes entitled to be cast by that group, *including* interested shares - is required under subdivision (1) *only* "if the proposed control share acquisition would, if fully carried out, result in any of the changes described in IC 23-1-38-4(a)", *i.e.,* amendments to the articles of incorporation that specifically affect a particular class or classes of shares. See IC

23-1-38-4(a) and RMA and BCL Official Comments. The Commission has emphasized here that a vote under subdivision (1) is not required in all control share acquisitions because both the Federal District Court and the Court of Appeals in the *CTS* case incorrectly held to the contrary, without certifying the question to the Indiana Supreme Court and despite being advised by the Attorney General of Indiana that this was an erroneous reading of the statute. The United States Supreme Court declined to comment on the issue, considering it unnecessary to its decision upholding the Chapter. *See Dynamics Corp. of America v. CTS Corp.*, 637 F. Supp. 389, 398 (N.D. Ill.), *aff'd*, 794 F.2d 250, 261 (7th Cir. 1986), *rev'd*, 481 U.S. 69, 73 n. 3 (1987).

If a vote is required under subdivision (1), the statutory separate class voting rules of IC 23-1-38-4(a) also apply. Under either the subdivision (2) or (if necessary) the subdivision (1) vote, whether there is more than one "voting group" entitled to vote separately, depends on the general voting structure of the issuing public corporation. Except for any application of the special voting rules of IC 23-1-38-4(a) in a subdivision (1) vote, however, only shares that otherwise have voting power are entitled, under either subdivision, to vote on the control shares voting rights resolution. *See also* IC 23-1-42-8(a) and Official Comment.

23-1-42-10 Official comments

(a) Subsection (a) permits mandatory redemption of control shares by the issuing public corporation, at any time within 60 days of the last acquisition of any control shares by the acquiring person if (1) such redemption was authorized in the corporation's articles of incorporation or bylaws *before* the control share acquisition has actually occurred and (2) no acquiring person statement with respect to the acquisition (or a statement that does not comply with IC 23-1-42-6) has been delivered to the corporation.

Thus, the acquiring person has it within its power to cut-off any redemption at any time before notice of the redemption has been given simply by delivering an acquiring person statement that complies with IC 23-1-42-6. Also, the corporation cannot authorize such redemption in its articles or bylaws after the control share acquisition has occurred *i.e.*, after the acquiring person has in fact acquired the ability to exercise or direct the exercise of voting power within the ranges specified in IC 23-1-42-1.

The authority to redeem under this section applies only to "control shares," not the acquirer's preacquisition shares. The redemption price must be "the fair value" of the shares, determined "pursuant to procedures adopted by the corporation." "Fair value" as used in this subsection is *not,* however, identical to "fair value" as defined in IC 23-1-44-3 for purposes of the Dissenters' Rights Chapter or in IC 23-1-42-11(c) for purposes of the special dissenters' rights created by that section for certain control share acquisitions. Rather, "fair value" under section 10 is determined by the procedures adopted by the corporation and such procedures are not required to take into account (and may expressly disregard) any increase in the market price of the shares following the announcement or commencement of the proposed control share acquisition. Control acquisitions often lead to speculative increases in market price; more generally, the redemption authorized by this section is not intended to give an acquirer any statutory basis whatsoever for arguing that it is entitled to any "redemption premium" (sometimes called "greenmail") from the corporation.

(b) Subsection (b) expressly states that any redemption rights under subsection (a) are cut-off by the delivery of an acquiring person statement and will not be reinstated unless the control shares "are not accorded full voting rights by the shareholders" under IC 23-1-42-9. "Full" voting rights means all the voting rights that the shares had before the acquisition converted them into "control shares." Any limitation, condition or qualification on voting rights in the shareholder approval resolution will make the rights something less than "full." *See also* IC 23-1-42-9(a) and Official Comment.

23-1-42-11 Official comments

(a) Subsection (a) grants special dissenters' rights "as provided in this chapter" to all shareholders of a corporation if (1) control shares have been granted "full" voting rights, *see* IC 23-1-42-9(a) & -10(b) and Official Comments, and (2) the acquiring person's control shares give it a majority or more of all voting power unless the corporation's articles of incorporation or bylaws provided *before* the acquisition that shareholders will not have such dissenters' rights. Hence, an acquiring person cannot use its post-acquisition voting power to eliminate the dissenters' rights provided by section 11.

IC 23-1-44-8(a)(4) also grants dissenters' rights on the approval of *any* control share acquisition. Dissenters' rights under IC 23-1-44-8(a)(4), however, are subject to all of Chapter 44's rules - such as IC 23-1-44-3's definition of "fair value;" the pre-meeting notice requirements for the corporation and shareholders set forth in IC 23-1-44-10 & -11, respectively; and the "market exception" of IC 23-1-44-8(b). By contrast, the special dissenters' rights "as provided in this chapter [42]" that are created by subsection (a) use the special definition of "fair value" set forth in subsection (c); and are subject to the *post*-meeting notice requirements of subsection (b) and are available regardless whether an issuing public corporation is subject to IC 23-1-44-8(b)'s "market exception" for dissenters' rights under Chapter 44.

(b) Subsection (b) requires that notice to shareholders of their special dissenters' rights under Chapter 42 "to receive the fair value of their shares pursuant to IC 23-1-44" must be sent "as soon as practicable" *after* the events described in subsection (a) have occurred. No *pre*-meeting notice of the special dissenters' rights created by section 11 is required. (However, an issuing public corporation will have to give pre-meeting notice, under IC 23-1-44-10 of the *general* control share acquisition dissenters' rights created by IC 23-1-44-8(a)(4) unless it is subject to IC 23-1-44-8(b)'s "market exception" for Chapter 44 dissenters' rights.)

Likewise, a shareholders entitlement to section 11's special dissenters' rights is *not* subject to satisfying the requirements of IC 23-1-44-11, which contemplates notice to the shareholder of potential dissenters' rights *before* the meeting at which the action giving rise to those rights will be considered. (Again, however, entitlement to any *general* control share acquisition dissenters' rights under IC 23-1-44-8(a)(4) *is* subject to compliance with the rules of IC 23-1-44-11.)

(c) Subsection (c) defines "fair value" for purposes of Chapter 42's special dissenters' rights as "a value not less than the highest price per share paid by the acquiring person in the control share acquisition." "Fair value" as defined in IC 23-1-44-3 for Chapter 44's dissenters' rights is not controlling (though it does apply to any *general* control share acquisition dissenters' rights that may be available under IC 23-1-44-8(a)(4)).

Subsection (c)'s special definition of "fair value" is consistent with Chapter 42's purpose of protecting shareholders who might otherwise be left to the mercy of a newly dominant shareholder. *See* Official Comment to IC 23-1-42-5. Specifically, it requires an acquiring person who obtains a majority or more of voting power to pay any dissenting minority shareholder in cash not less than the highest per share price the acquirer paid to achieve his dominant position.

Ability to satisfy the obligation to pay dissenters in compliance with subsection (c)'s "fair value" requirement is, of course, one factor affecting the acquiring person's "financial capacity to make the proposed control share acquisition" that must be addressed in a pre-acquisition acquiring person statement under IC 23-1-42-6(5)(B), if the acquisition would trigger section 11's special dissenters' rights.

23-1-43-2 Official comments

The "announcement date" definition reflects the fact that corporations subject to Chapter 43 - since they will generally be publicly-held corporations with a class of voting shares registered with the SEC under section 12 of the Exchange Act, 15 U.S.C. § 78l, *see* IC 23-1-43-20 and Official Comment - will usually be obligated to announce publicly the vast majority of transactions that constitute "business combinations" under IC 23-1-43-5.

23-1-43-5 Official comments

Section 5's definition of "business combination" specifies the transactions subject to Chapter 43's rules. Consistent with the shareholder protection purposes of the Chapter, *see* Introductory Official Comment to IC 23-1-43, the definition is intended to include virtually any kind of transaction that would allow a potential acquirer to use the corporation's assets to finance the acquisition or otherwise to benefit its own interests rather than the interests of the corporation and its other shareholders.

(1) Under subdivision (1), a "business combination" includes any merger (whether forward or reverse), with (a) an "interested shareholder," as defined in IC 23-1-43-10 or (b) any other corporation that, after the merger, would be an affiliate or an associate of the interested shareholder. Absent Chapter 43, a merger would be one very easy way to effect a transfer of assets from a corporation subject to the Chapter.

(2) Subdivision (2) includes in the definition of "business combination" any direct shift of assets from the covered corporation to the interested shareholder or its affiliates or associates whether by sale, lease, exchange, mortgage, pledge, transfer or other disposition, in a single transaction or a series of transactions where the value of the assets being transferred equals 10% or more of: (a) the "market value" (as defined in IC 23-1-43-11(2)) of the corporation's total assets; (b) the "market value" (as defined in IC 23-1-43-11(1)) of the corporation's outstanding shares; or (c) the corporation's earning power or net income. The tests are alternative, not cumulative: if the value of the assets being transferred exceeds any one of the three 10% thresholds, the transfer will be a "business combination."

(3) Subdivision (3) makes the term "business combination" include any issuance of a covered corporation's shares to an interested shareholder or its affiliates or associates if: (a) the value of the shares being issued equals 5% or more of the aggregate "market value" (as defined in IC 23-1-43-11(1)) of the corporation's outstanding shares and (b) the shares are not being issued under the exercise of warrants or rights offered, or a dividend or distribution paid or made, *pro rata* to all shareholders. Thus, an attempted disproportionate issuance of shares to an interested shareholder is subject to Chapter 43's rules.

(4) Under subdivision (4), a "business combination" also includes any plan or proposal for liquidation or dissolution of a covered resident domestic corporation proposed by, or under any written or oral agreement, arrangement or understanding with, an interested shareholder or its affiliates or associates.

(5) Subdivision (5) defines a "business combination" to include *any* kind of transaction proposed by, or under any written or oral agreement, arrangement or understanding with, an interested shareholder or its affiliates or associates that could result in any disproportionate increase in the ownership of the covered corporation by the interested shareholder or its affiliates or associates.

(6) Subdivision (6) includes in the definition of "business combination" other disproportionate transfers of money, property, benefits or advantages to the interested shareholder or its affiliates or associates, whether through loans, advances, guarantees, pledges, tax credits, other tax advantages or other financial assistance (such as compensating balances).

23-1-43-6 Official comments

The BCL contains no definition of "common shares" as such. However, because the rules of IC 23-1-43-19 distinguish between "common" and "preferred shares," section 6 defines the former term, and IC 23-1-43-12 provides a complementary definition of the latter, for purposes of Chapter 43. Section 6 simply excludes from the definition of "common shares" any shares properly determined to be "preferred shares" under IC 23-1-43-12, but otherwise is inclusive.

23-1-43-8 Official comments

Section 8 provides an inclusive, but fairly standard, definition of "control."

(a) Subsection (a) follows the definition of "control" contained in Reg. 12b-2, 17 C.F.R. § 240.12b-2, promulgated under the Exchange Act, as that regulation existed on January 8, 1986.

(b) Under subsection (b), 10% "beneficial ownership," as defined in IC 23-1-43-4, establishes a presumption of "control." The presumption is conclusive unless it is rebutted under the rules of subsection (c); general arguments that the 10% owner does not have "real control" are irrelevant.

Subsection (b)'s 10% threshold is the same as that used in section 16(a) of the Exchange Act, 15 U.S.C. § 78 p(a), to give rise to liability for short-swing profits in purchases and sales of publicly traded shares, and exists in other Exchange Act contexts as well. Here, as under the Exchange Act, the reason for the 10% threshold is that a shareholder with that degree of control can, if it wishes, obtain inside information that can be abused, or otherwise exert influence over the policies of a publicly-held corporation sufficient to consider the shareholder to be part of corporate management. *See also* Official Comment to IC 23-1-43-10(a). *The 10% threshold adopted for purposes of Chapter 43 is lower than the one-fifth, one-third and one-half thresholds adopted for purposes of the Control Share Acquisitions Chapter. See* IC 23-1-42-1 and Official Comment.

(c) Subsection (c) excludes from the presumption of control those institutional holders whose aggregate holdings for the accounts of other shareholders exceed 10% if (a) the vote of such shares in a proxy fight must be directed by the true beneficial owners and (b) the true beneficial owners themselves do not individually or as a group have "control" over the corporation.

23-1-43-10 Official comments

(a) Subsection (a)'s definition of "interested shareholder" is one of the keys to Chapter 43, since the Chapter's substantive prohibitions involve transactions between a resident domestic corporation and an "interested shareholder." Because shares owned by the resident domestic corporation itself or its subsidiaries may not be voted and thus have no control implications, *see* IC 23-1-30-2(b) and Official Comment, neither the corporation nor any of its subsidiaries is a "person" who can be an "interested shareholder" of that corporation. "Subsidiary" of a "resident domestic corporation" is defined for purposes of Chapter 43 in IC 23-1-43-16.

Subdivision (1) includes in the definition any person who, directly or indirectly, owns 10% or more of the voting power of the resident domestic corporation. The 10% figure has analogs not only in the Exchange Act, *see* Official Comment to IC 23-1-43-8(b), but also in other state statutes. For example, a presumption of control arises on 10% ownership under both the National Association of Insurance Commissioners Model Holding Company Statute (adopted in most states) and Indiana insurance statutes, *see* IC 27-1-23. Also, a 10% holding can give a shareholder sufficient leverage to force "greenmail" *i.e.,* redemption of his shares at a premium. The 10% threshold adopted for purposes of Chapter 43 is lower than the one-fifth, one-third and one-half thresholds adopted for purposes of the Control Share Acquisitions Chapter. *See* IC 23-1-42-1 and Official Comment.

Subdivision (2) includes as an "interested shareholder" an "affiliate" or "associate" of the resident domestic corporation, as defined in IC 23-1-43-1 & -3, respectively, who held as much as a 10% beneficial ownership position at any time during the preceding five years. Such persons will often have used that ownership to put themselves in a position of "control" over the corporation as effectively as if they still held a 10% interest.

(b) Subsection (b) provides that, for purposes of determining whether a person is an "interested shareholder," both (1) the number of outstanding shares of the corporation and (2) the number of shares owned by that person will be deemed to include any shares that the person has the right to acquire through any of the means described in IC 23-1-43-4, such as written or oral agreements, arrangements or understandings or exercise of conversion rights, exchange rights, warrants or options. Such inclusion is proper, because a person attempting to obtain control of a corporation is highly likely to exercise whatever share acquisition rights are available to it. However, shares that might be issuable to *other* persons through any of the means described in IC 23-1-43-4 are *not* included in calculating the number of outstanding shares of the corporation, since there is no corresponding likelihood that such other persons will exercise such rights. This approach comports with that taken by the SEC in determining (1) a "beneficial owner of a security" under section 13(d) of the Exchange Act, 15 U.S.C. § 78m(d), and (2) a "reporting person" under section 16(a) of the Exchange Act, 15 U.S.C. § 78 p(a). *See* Regs. 13d-3(d) & 16a-2(b), 17 C.F.R. §§ 240.13d-3(d) & 240.16a-2(b).

23-1-43-11 Official comments

Section 11's definition of "market value" protects the shareholders of corporations covered by Chapter 43 in two contexts - determining the amount of assets that an acquirer can transfer from the corporation, *see* IC 23-1-43-5 and Official Comment, and the amount of consideration that shareholders can ultimately receive for their shares, *see* IC 23-1-43-19(3) and Official Comment.

(1) Subdivision (1) provides that the "market value" of a share is: its highest closing sale price during the 30-day period preceding the date in question, as reported on the Composite Tape for New York Stock Exchange listed securities; the reporting system for other exchanges recognized by the SEC; or the Automated Quotation System for the National Association of Securities Dealers, Inc., or any similar system then in use. Chapter 43's recognition of these established quotation systems is consistent with Chapter 44's "market exception" to dissenters' rights. *See* IC 23-1-44-8(b) and Official Comment.

If the shares are not quoted on any generally recognized quotation system, the board of directors of the corporation may conclusively determine their value on the date in question, so long as its determination is made in good faith.

Subdivision (2) provides that the "market value" of property other than shares is its value on the date in question as determined by the board of directors of the resident domestic corporation. As with its determination of the value of shares not quoted on a recognized quotation system, the board's determination of the "market value" of property other than shares is conclusive, if the determination is made in good faith.

23-1-43-13 Official comments

(a) Subsection (a) defines which corporations are "resident domestic corporations" subject to the Chapter. As the term implies, the first requirement is that the corporation be an Indiana corporation. As in the definition of "issuing public corporation" for purposes of Chapter 42, *see* IC 23-1-42-4(a) and Official Comment, the term "corporation" as used here is defined for purposes of the entire BCL as "a corporation for profit that is not a foreign corporation, incorporated under or subject to the provisions of this article." IC 23-1-20-5.

Second, a "resident domestic corporation" must have 100 or more shareholders. Much like the identical requirement for "issuing public corporations" subject to the Control Share Acquisitions Chapter, *see* IC 23-1-42-4(a) and Official Comment, the "100 or more shareholder" rule limits the applicability of Chapter 43 to corporations in which share ownership is fairly dispersed, since it is precisely in such corporations that changes of control can occur in market transactions and minority shareholders might not be in a position effectively to protect themselves.

Under IC 23-1-43-20, a resident domestic corporation must generally also have a class of voting shares registered with the SEC under section 12 of the Exchange Act, 15 U.S.C. § 781, before the Chapter's rules will apply. However, while corporations that have such a class of registered shares may "opt out" of the Chapter and corporations without such a class of registered shares may "opt in," *see* IC 23-1-43-20 & -22 and Official Comments, corporations that do not meet the definition of "resident domestic corporation" *i.e.*, Indiana corporations with 100 or more shareholders are not covered by the Chapter.

(b) Subsection (b) establishes that events or actions that occur while a resident domestic corporation is subject to Chapter 43 cannot make the corporation no longer subject to the Chapter. In other words, action taken after a person has become an "interested shareholder" cannot be used to avoid applicability of Chapter 43 to a resident domestic corporation. For example, an acquirer cannot evade the Chapter by first taking steps to reduce the number of shareholders to less than 100 and then engage freely in transactions that are prohibited or regulated by the Chapter.

23-1-43-15 Official comments

Section 15 defines "share acquisition date" - which is the operative date for application of Chapter 43's rules, *see* IC 23-1-43-18 & -19 and Official Comments - as the date on which a person became an "interested shareholder," as defined in IC 23-1-43-10.

23-1-43-17 Official comments

Section 17 provides that "voting shares" mean shares "entitled to vote generally in the election of directors." Under the BCL, shares may have either unlimited voting power or "special, conditional, or limited voting rights, or no right to vote, except to the extent prohibited by this article." IC 23-1-25-1(c)(1). Whatever other voting or other rights shares may have, however, if they are "entitled to vote generally in the election of directors" they are "voting shares" for purposes of Chapter 43. Chapter 42 uses a similar definition for the "control shares" subject to that Chapter's rules. *See* IC 23-1-42-1 and Official Comment.

23-1-43-24 Official comments

Section 24 provides that Chapter 43 will not apply to a business combination with a person who was already an interested shareholder on January 7, 1986, the day before the BCL legislation was introduced in the Indiana General Assembly. As with the new corporate governance rules established by the Control Share Acquisitions Chapter, *see* IC 23-1-42-2(c) and Official Comment, the Commission believed it equitable to have the new rules on business combinations established by Chapter 43 apply only to persons who became interested shareholders after it was public record that those rules were being considered.

23-1-44-3 Official comments

The exclusion from the definition of "fair value" of appreciation or depreciation in anticipation of the corporate action is consistent with prior Indiana law. The exception to the rule - "unless exclusion would be inequitable" - is intended to apply only in limited and extraordinary circumstances. It is *not* intended to allow a dissenter to claim the benefit of stock appreciation flowing from approval of the corporate action to which he dissented.

"Fair value" is defined differently for purposes of the special dissenters' rights created on approval of certain control share acquisitions under Chapter 42. *See* IC 23-1-42-11 & -44-8(a)(4) and Official Comments. *See also* IC 23-1-43-11 and Official Comment (definition of "market value" for purposes of the Business Combinations Chapter, IC 23-1-43).

23-1-44-8 Official comments

(a) (1) Subsection (a)(1) generally follows the RMA, but deletes RMA language authorizing dissenters' rights for those parent-subsidiary mergers that (under IC 23-1-40-4) do not require shareholder approval.

The GCA was arguably ambiguous on this point. IC 23-1-5-7 (repealed 1986) granted dissenters' rights for any shareholder "who did not vote in favor" of a merger "at the meeting at which the agreement" of merger "was adopted by the shareholders." IC 23-1-5-8 (repealed 1986) authorized merger of a subsidiary into a parent without shareholder approval if the parent owned 95% or more of the subsidiary's shares. One could argue, therefore, either that such a parent-subsidiary merger (a) created dissenters' rights because a dissenting shareholder did not "vote in favor of it" or (b) did *not* create dissenters' rights because there was no "meeting" at which the merger agreement "was adopted by the shareholders" in the first place.

The Commission believed the latter view was clearly the better one - both under the provisions of the GCA and, more important, as a matter of policy. Hence, it recommended continuing the rule that parent-subsidiary mergers that do not require shareholder approval also do not create dissenters' rights.

(a) (3) Though subdivision (3) follows the RMA language without substantive change, an important point about its application in one context is not addressed in the RMA Official Comments.

Subdivision (3) provides that a sale pursuant to a plan under which all or substantially all of the net proceeds will be distributed to shareholders "within one (1) year after the date of sale" does not create dissenters' rights. Often, a dissolving corporation must establish reserves or liquidation funds from the net proceeds of a dissolution sale, to be held by a trustee or other fiduciary for the benefit of shareholders and creditors. Because such funds may be needed to secure contingent or unaccrued liabilities of the corporation, they often must be held for more than one year after the dissolution sale. The holding of such funds by a trustee or other fiduciary for more than a year does *not* mean, however, that the sale is therefore outside subdivision (3)'s exception and that dissenters' rights are available. Distribution to the trustee or other fiduciary, who holds the funds for the benefit of creditors and shareholders, constitutes distribution to the shareholders within the meaning of the subdivision.

More generally, of course, "net proceeds" as used in subdivision (3) means "net proceeds available for distribution to the shareholders." The fact that some proceeds in excess of the costs of the sale may first be distributed to corporate creditors does not take a sale transaction out of the subdivision's exception.

(a) (4) Subdivision (4) substitutes another transaction that will create dissenters' rights - approval of a control share acquisition under IC 23-1-42, which has no RMA counterpart - for an RMA provision that was deleted in its entirety.

The Commission recommended granting dissenters' rights on approval of a control share acquisition because such an acquisition, like a merger or share exchange, represents a fundamental change in the nature of the corporation. *See* Introductory Official Comment to Chapter 42; Official Comment to IC 23-1-42-5. The dissenters' rights created by this subdivision apply to *any* control share acquisition approved under Chapter 42. Chapter 42 also establishes, however, special dissenters' rights, with a special definition of "fair value," on approval of a control share acquisition in which an acquirer obtains "full voting rights" for shares representing "a majority or more of all voting power" of the corporation. *See* IC 23-1-42-11 and Official Comment.

The deleted RMA provision is RMA § 13.02(a)(4), which grants dissenters' rights on adoption of the following:

An amendment of the articles of incorporation that materially and adversely affects rights in respect of a dissenter's shares because it:

(i) alters or abolishes a preferential right of the shares;

(ii) creates, alters, or abolishes a right in respect of redemption, including a provision respecting a sinking fund for the redemption or repurchase, of the shares;

(iii) alters or abolishes a preemptive right of the holder of the shares to acquire shares or other securities;

(iv) excludes or limits the right of the shares to vote on any matter, or to cumulate votes, other than a limitation by dilution through issuance of shares or other securities with similar voting rights; or

(v) reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under Section 6.04.

The Commission believed adoption of this RMA provision would represent a substantial and unwarranted expansion of prior Indiana law, which provided dissenters' rights only for corporate reorganization transactions.

(a) (5) The GCA had no optional provision authorizing corporations to establish dissenters' rights for particular transactions to which they would otherwise not apply. The Commission recommended following the RMA in allowing corporate flexibility in this area.

The flexibility granted by subdivision (5) is complete: A corporation that opts to create special dissenters' rights need not adopt either the definitions or procedures of IC 23-1-44. For example, it may use "book value" instead of "fair value" as defined in IC 23-1-44-1; or it may make the corporation's determination of value conclusive, notwithstanding Chapter 44's appraisal rules with respect to statutory dissenters' rights.

(b) Subsection (b), which has no RMA counterpart, retains and expands the GCA's "market exception" to dissenters' rights, found in IC 23-1-5-7(d) (repealed 1986). The policy reason for this exception is that the market itself establishes both a fair price for the shares and a means by which a "dissenting" shareholder can sell his shares for that price. The Commission found the RMA Official Comments' distrust of market price unpersuasive, in light of past experience in Indiana. Accordingly, it recommended that the GCA approach be followed, and that the categories of recognized markets be expanded to include "the National Association of Securities Dealers, Inc. Automated Quotations Systems Over-the-Counter Markets - National Market Issues or a similar market."

(c) Subsection (c), which establishes the exclusivity of Chapter 44's dissenters' rights remedies, deletes RMA language stating that such rights are exclusive "unless the action is unlawful or fraudulent with respect to the shareholder or the corporation." Deletion of this language reflects a conscious response to the Indiana Supreme Court's decision in *Gabhart v. Gabhart,* 370 N.E.2d 345 (1972).

Gabhart involved the interpretation of the GCA's exclusivity provision, IC 23-1-5-7(c) (repealed 1986), which provided:

Every shareholder who did not vote in favor of such merger, consolidation, or exchange and who does not object in writing and demand payment of the value of his shares at the time and in the manner stated in this section shall be conclusively presumed to have assented to such merger, consolidation, or exchange.

Notwithstanding this language, the *Gabhart* court held that a minority shareholder was entitled to challenge a "freeze-out" merger as a *de facto* dissolution if the merger did not have a "valid purpose" - defined by the Court as a purpose intended to advance a corporate interest. *Gabhart* refused to adopt the approach of the then-leading Delaware case, *Singer v. Magnavox Co.,* 380 A.2d 969 (Del. 1977) (later overruled in *Weinberger v. UOP, Inc.,* 457 A.2d 701, 703 (Del. 1983)), which permitted judicial inquiry into the entire fairness of the transaction on the basis of fiduciary duty owed to minority shareholders. The *Gabhart* court also found that IC 23-1-5-7(c) (repealed 1986) did establish the exclusive remedy for mergers with a "valid purpose." Absent such a "valid purpose," however, *Gabhart* held that minority shareholders were not limited to statutory appraisal rights but could also seek to enjoin the corporate transaction creating those rights.

Whether or not *Gabhart* correctly interpreted the GCA's exclusivity provision, the Commission believed the decision created substantial uncertainty about whether and to what extent minority shareholders could seek to enjoin or undo corporate transactions authorized by statute and approved by the majority. Given the potential for disruption of corporate transactions were a *Gabhart* rule applied to the BCL, the General Assembly adopted subsection (c) as a categorical statutory rule that shareholders entitled to dissenters' rights may *not* challenge the corporate action creating that entitlement. Hence, the kind of minority shareholder challenge to corporate action permitted by *Gabhart* under IC 23-1-5-7(c) (repealed 1986) is not permitted under subsection (c).

In 1987, subsection (c) was amended to extend this categorical prohibition to shareholders who would be entitled to dissenters' rights but for the "market exception" of subsection (b). Such shareholders, who have the ability to sell their shares in a recognized market and at a market price, also may not challenge the corporate action that (but for the "market exception") would have created dissenters' rights.

23-1-44-12 Official comments

(a) The GCA had no comparable provision for a "dissenters' notice."

(b) The language "no later than ten (10) days after approval by the shareholders, or if corporate action is taken without approval by the shareholders, then ten (10) days after the corporate action was taken," replaces the RMA wording "no later than ten (10) days after the corporate action was taken."

The RMA wording is unclear because "corporate action" could be interpreted to mean either (1) the action of the shareholders in approving a proposed transaction, or (2) the proposed transaction itself. The BCL language clarifies that the latter is the correct reading of "corporate action" (which is consistent with the RMA Official Comments, *see* MODEL BUSINESS CORP. ACT ANN. § 13.22(b) (3d ed. 1985)). The BCL language also requires, however, earlier notice of dissenters' rights when the "corporate action" (*i.e.*, the proposed transaction) is one approved by the shareholders.

Under the BCL rule, the dissenters' notice for any transaction approved by shareholder vote must be sent no later than ten days after the date of the vote. For transactions not requiring shareholder approval, the notice must be sent no later than ten days after the transaction itself occurs.

23-1-44-13 Official comments

(a) A cross-reference was added to the notice required by IC 23-1-42-11 for the special dissenters' rights created by that section on approval of certain control share acquisitions under Chapter 42, which has no RMA counterpart. *See* IC 23-1-42-11 & -44-8(a)(4) and Official Comments.

(c) The language "and is considered, for purposes of this article, to have voted the shareholder's shares in favor of the proposed corporate action" was added at the end of subsection (c) to eliminate any uncertainty that might result should a shareholder fail to follow through with Chapter 44's dissenters' rights procedures. The added language is similar to the GCA provision in IC 23-1-5-7(c) (repealed 1986) that every shareholder who did not vote in favor of the proposed corporate action and did not dissent would be "conclusively presumed to have assented to" the action. The new language also complements the BCL's categorical rule that dissenters' rights constitute the exclusive remedy for a shareholder who opposes corporate action. *See* IC 23-1-44-8(c) and Official Comment.

23-1-44-15 Official comments

(a) The phrase "if the transaction did not need shareholder approval and has been completed" was added to subsection (a) for clarity, consistent with the changes from the RMA made in IC 23-1-44-12(b). *See* IC 23-1-44-12(b) and Official Comment. However, unlike the changes in IC 23-1-44-12(b) (which require earlier *notice* of dissenters' rights for shareholder approved transactions than does the RMA), the changes in subsection (a) here do not alter the RMA rules on *payment* of dissenters. As under the RMA, a dissenter is entitled to payment (1) in shareholder approved transactions, when the "corporate action" (*i.e.*, the transaction itself, not the shareholder vote) occurs, or (2) if the transaction did not require shareholder approval and has been completed, upon the corporation's receipt of the dissenter's demand for payment.

The BCL deletes from this subsection the RMA requirement that payment to the shareholder include "accrued interest" in addition to the estimated fair value of the shares. Indiana has traditionally rejected prejudgment interest in dissenters' rights cases. *See, e.g., Perlman v. Permonite Manufacturing Co.*, 568 F.Supp. 222 (N.D. Ind. 1983), aff'd, 734 F.2d 1283 (7th Cir. 1984) (Indiana law); *General Grain, Inc. v. Goodrich*, 221 N.E.2d 696 (Ind App. 1966). Though the Commission recommended following the RMA and departing from the prior Indiana rule on prejudgment interest in the event judicial appraisal of the shares is required, *see* IC 23-1-44-19(e)(1) and Official Comment, it did not believe interest was appropriate if the corporation pays a dissenter the fair value of his shares without resort to judicial proceedings.

The GCA required no payment of fair value or interest to dissenters in advance of settlement or adjudication.

(b) Since the BCL deletes the RMA "accrued interest" requirement in subsection (a), it also deletes the corresponding RMA rule that the financial statements described in subsection (b) include an explanation of how interest was calculated.

The 1987 amendments to the BCL eliminated as unnecessary a requirement that payment under this section be accompanied by a copy of Chapter 44, since a corporation is required to send a copy of the Chapter after a shareholder dissents. *See* IC 23-1-44-12(b)(5).

23-1-44-17 Official comments

(a) Unlike the BCL, the GCA did not provide less favorable treatment for a shareholder who acquired stock after notice of the transaction that triggered dissenters' rights.

(b) Subsection (b) deletes the RMA's "accrued interest" requirement on payment of the fair value of after-acquired shares, consistent with the deletion of that requirement in IC 23-1-44-15(a). *See also* Official Comment to IC 23-1-44-15(a).

23-1-44-18 Official comments

(a) All RMA references to "interest" payments and calculations were deleted in this subsection, consistent with the deletion of the RMA's "accrued interest" requirements in IC 23-1-44-15(a) & -17(b). *See also* Official Comment to IC 23-1-44-15(a) & -17(b).

23-1-44-19 Official comments

(a) A cross-reference was added to IC 23-1-42-11, which creates special dissenters' rights on approval of certain control share acquisitions under Chapter 42, which has no RMA counterpart. *See* IC 23-1-42-11 & -44-8(a)(4) and Official Comments.

The RMA requirement that a corporation petition the court to determine "accrued interest" as well as "the fair value of the shares" was deleted in this subsection, consistent with the deletion of the RMA's "accrued interest" requirements in IC 23-1-44-15(a) & -17(b). *See* IC 23-1-44-15(a) & -17(b) and Official Comments.

The GCA, unlike subsection (a), authorized the dissenter as well as the corporation to institute a judicial appraisal action. *See* IC 23-1-5-7 & -6-5 (repealed 1986).

(e) Unlike prior Indiana law, *see* IC 23-1-5-7 & -6-5 (repealed 1986), subsection (e) expressly provides for an award of prejudgment interest on (a) the amount by which the court finds the fair value of the dissenters' shares exceeds the amount previously paid by the corporation under IC 23-1-44-15, or (b) with respect to "after-acquired" shares for which the corporation elected to withhold payment under IC 23-1-44-17, the fair value of such shares.

This subsection is a statutory response to the Indiana Court of Appeals' express invitation to the General Assembly to remedy what the Court described as a "glaring injustice" of the GCA. *General Grain, Inc. v. Goodrich,* 221 N.E.2d 696, 701 (Ind. App. 1966). Though the *General Grain* court declined to add an "interest" provision to the GCA appraisal statute by judicial fiat, it observed that denial of prejudgment interest ... "is certainly an anomaly and unfair to the dissenters as they are not only disallowed interest from the effective date of [a] merger, but are also deprived of the opportunity to participate in the management of the corporation and in dividends.". *Id.* at 701.

Subsection (c)'s authorization of prejudgment interest should encourage a corporation to make its initial payment to a shareholder under IC 23-1-44-15 in an amount the corporation in good faith believes is the fair value of the shares. On the other hand, since interest accrues only on the amount by which fair value exceeds the amount paid by the corporation, prejudgment interest should not give dissenting shareholders a significant disincentive to settlement.

23-1-45-1 Official comments

Under the GCA, a "short-form" dissolution was possible only if the corporation had not issued any shares and had not commenced business. *See* IC 23-1-7-1(a) (repealed 1986). The BCL permits short-form dissolution if either one of these conditions is satisfied. This method of dissolution is likely to be used by "name-holding" corporations or by corporations that were formed for the initiation of a new venture but the reasons for the initial creation of the corporation have been completely realized or will never come to fruition.

The required provisions of articles of dissolution provided in this section take account of the fact that a corporation may utilize this section even though it has received capital from the issuance of shares or has incurred liabilities either from the commencement of business without issuing shares or from its organization; hence the articles must state that no debts remain unpaid, and the net assets of the corporation remaining after winding up have been distributed to the shareholders.

Even though a dissolving corporation may not have commenced business or acquired a tax identification number, it must still give notice of the dissolution to the Indiana Department of Revenue, under *IC 6-8.1-10-9*, the Indiana Department of Workforce Development, under IC 22-4-32-23 and the Unclaimed Property Division for the Indiana Attorney General, under IC 32-34-1-25.

23-1-45-2 Official comments

The GCA permitted holders of a majority of the outstanding shares entitled to vote on dissolution to initiate that process by a written request to the board of directors to submit the issue of dissolving the corporation to a shareholder vote. *See* IC 23-1-7-1(b)(1) (repealed 1986). The BCL does not permit shareholder initiation of dissolution.

Subsection (b)(1)

Subsection (b)(1) requires the board of directors to either recommend dissolution when it submits a dissolution proposal to the shareholders, or explain why a conflict of interest or other special circumstance has led it to decide not to make a recommendation. This provision was not included in the GCA. *See* IC 23-1-7-1(b)(1) (repealed 1986). For example, the board of directors may determine that dissolution is appropriate, but (a) there may not be a sufficient number of directors free of a conflict in interest to approve the proposal or (b) the board of directors may be evenly divided as to the merits of the proposal but is able to agree that shareholders should be permitted to consider dissolution. If the board of directors makes such a determination, it must describe the conflict of interest or special circumstances and communicate the basis for the determination when submitting the proposal to dissolve to the shareholders.

Subsection (c)

Subsection (c) authorizes the board to condition its submission of a dissolution proposal to shareholders on any basis. Among the conditions that a board might impose are that the proposal will not be deemed approved unless it is approved by a specified percentage vote of the shareholders, or by one or more specified classes or series of shares, voting as a separate voting group, or by a specified percentage of disinterested shareholders. The board of directors is not limited to the conditions given as examples. This subsection had no GCA counterpart.

Subsection (d)

Subsection (d) requires that every shareholder, whether or not entitled to vote, must be given notice of the shareholders' meeting at which a dissolution proposal will be considered. Requirements concerning the timing and content of a notice of a meeting are set out in IC 23-1-29-5. Under the GCA, consideration of such a proposal at a special shareholders' meeting required notice to voting shareholders only. *See* IC 23-1-2-9 (repealed 1986); IC 23-7-1(b)(1) repealed 1986).

Subsection (e)

Subsection (e) provides that approval of a proposal for dissolution requires approval of the shareholders at a meeting at which a quorum consisting of a majority of the votes entitled to be cast on the proposal exists. If a quorum is present, then under IC 23-1-30-6, the proposal to dissolve will be approved if more votes are cast in favor of the proposal than against it by the voting group or separate voting groups entitled to vote on the proposal, unless otherwise required by the articles of incorporation or the board of directors acting under Subsection (c).

Subsection (f)

Subsection (f), which has no GCA counterpart, requires that after a proposal for dissolution is adopted, the corporation must give notice of the dissolution to the Indiana Department of Revenue, under IC 6-8.1-10-9, and the Indiana Department of Workforce Development (formerly known as the Employment Security Division), under IC 24-4-32-23 (repealed). The 1988 amendments added a cross-reference to IC 32-34-1-25 (a section of the Indiana Uniform Disposition of Unclaimed Property Act) under which notice must also be sent to the Unclaimed Property Section of the Attorney General's office within ten days of adoption of a resolution of dissolution.

The notice requirements referenced in this subsection reflect a significant departure from GCA dissolution rules. IC 23-1-7-1(b)(3) (repealed 1986) of the GCA also required notice to the Department of Revenue (under IC 6-8.1-10-8) (repealed 1987), the Employment Security Division (under IC 22-4-32-22 (repealed 1987)) and the Attorney General's office (under IC 32-34-1-25). While the last of these was indeed simply a notice requirement, IC 6-8.1-10-8 and IC 22-4-32-22 prohibited issuance of a certificate of voluntary dissolution by the Secretary of State until verification was received from the Department of Revenue and the Employment Security Division, respectively, that all taxes and unemployment contributions due from the corporation had been paid.

The time and expense of these clearance requirements led many corporations to ignore the GCA voluntary dissolution process. Instead, such corporations would simply adopt a plan of liquidation under the Internal Revenue Code without bothering to dissolve the corporation, leaving it in an uncertain status in the Secretary of State's office.

To encourage corporate compliance with the BCL's dissolution procedure, IC 6-8.1-10-8 and IC 22-4-32-22 were amended in 1986 (to be effective August 1, 1987), to eliminate the pre-clearance rules and require only that notice of dissolution be given to the Department of Revenue and Department of Workforce Development. In exchange for elimination of pre-clearance, however, several new enforcement provisions were added.

First, the amended sections imposed personal liability upon a corporation's directors and officers, for one year from the date the required notices were sent, for the disposition of corporate assets that prevented payment of taxes or unemployment contributions owed to the state. Second, the statutes authorized imposition of a penalty of up to 30% of the unpaid tax or contribution on directors or officers who failed "to take reasonable steps to set aside corporate assets to meet liability due." Third, the Department of Revenue and Department of Workforce Development were authorized to pursue any corporate assets that had been improperly distributed to corporate shareholders.

In 1987, before the amendments to IC 6-8.1-10-8 and IC 22-4-32-22 became effective, the sections were repealed and replaced by IC 6-8.1-10-9 and IC 22-4-32-23, respectively. The replacement sections still require notice of dissolution to the Department of Revenue and the Department of Workforce Development, but the provisions authorizing imposition of personal liability on directors and officers were expressly made subject to the BCL's "willful misconduct or recklessness" standard. *See* IC 23-1-35-1(e) and Official Comment. In addition, IC 6-8.1-10-9(h) and IC 22-4-32-23(h) created "safe harbors" from the imposition of personal liability on directors and officers for the payment of taxes and unemployment contributions, respectively, owed to the state. The Department of Revenue and the Department of Workforce Development may issue clearances releasing directors and officers from such liability if they have met the filing and payment requirements of IC 6-8.1-10-9(b) and IC 22-4-32-23(b), respectively, and have requested the clearance in writing within 30 days after filing notice of dissolution with the respective agencies. *See* IC 6- 8.1-10-9(g) and IC 22-4-32-23(g).

Also in 1987, subsection (f)'s cross-references to the Department of Revenue and Department of Workforce Development notice sections were changed to refer to the replacement sections.

23-1-45-3 Official comments

Subsection (a)

The GCA, unlike the BCL, provided that articles of dissolution could not be filed until winding up of corporate affairs was complete. *See* IC 23-1-7- 1(b)(4) (repealed 1986). The act of filing articles of dissolution under the BCL makes the decision to dissolve a corporation a matter of public record and establishes the time when a corporation must begin the process of winding up and cease carrying on its business, except to the extent necessary for winding up. If the dissolution was approved by the shareholders, the articles of dissolution must state that dissolution was duly approved by the shareholders pursuant to the BCL and the articles of incorporation of the corporation.

Articles of dissolution required to voluntarily dissolve a corporation under IC 23-1-45-3 may be filed at the commencement of winding up or at any time thereafter. This is the only filing required for voluntary dissolution. No filing is required to mark the completion of winding up since the existence of the corporation continues for certain purposes even after the business is wound up and the assets remaining after satisfaction of all creditors are distributed to the shareholders. IC 23-1-45-3 does not contain a time limit for filing articles of dissolution.

Subsection (b)

Subsection (b)'s rule that dissolution is effective on the date specified in the articles of dissolution differs from the GCA's provisions. Under the GCA, dissolution was not effective until the Secretary of State had approved the articles, which in turn could not be filed until winding up of corporate affairs was complete. *See* IC 23-1-7-1(b)(4) (repealed 1986); IC 23-1-7-1(d) (repealed 1986).

23-1-45-4 Official comments

Voluntary dissolution may be revoked within 120 days of the effective date of the dissolution. Because of the importance and finality of dissolution, the decision to revoke dissolution generally requires shareholder authorization (unless the dissolution was approved solely by the initial directors or incorporators under IC 23-1-45-1). Subsection (b), however, contemplates that the board of directors may revoke dissolution if it is granted that authority in advance by the shareholders when approving the dissolution. Such authorization is often included in proposals to dissolve that are contingent upon the effectuation of another transaction, such as a sale of corporate assets not used in the ordinary course of business.

Certain other action requiring shareholder approval may be revoked by the board of directors without express shareholder approval. *See* IC 23-1-40-3(i); IC 23-1-41-2(f). By contrast, except as provided in Subsection (b), dissolution under this section may not be revoked by the board of directors without approval of the shareholders.

Articles of revocation of dissolution must be filed to reflect the decision to resume the business of the corporation. The information required in these articles parallels the information required in the original articles of dissolution.

The effect of articles of revocation of dissolution is to eliminate the requirement that the corporation cease to conduct its business, except as part of the winding-up process and permit it to resume its business without limitation and as if dissolution had never occurred.

23-1-45-6 Official comments

A dissolving corporation is not required to follow section 6's procedures for disposing of known claims. If it does not, however, the section's special rules providing for earlier "fixing" and disposition of the amount of known claims will not be available, and such claims will then be subject to the two-year limitations period established by IC 23-1-45-7(b)(3) and IC 23-1-45-7(c).

Section 6's procedures for disposing of known claims differ significantly from both the RMA and GCA rules. Subsections (a) and (f) are identical to RMA § 14.06(a) and (d), respectively. Subsections (b) through (e), however, replace entirely RMA§ 14.06(b)-(c), which provide:

(b) The dissolved corporation shall notify its known claimants in writing of the dissolution at any time after its effective date. The written notice must:

(1) describe information that must be included in a claim;

(2) provide a mailing address where a claim may be sent;

(3) state the deadline, which may not be fewer than 120 days from the effective date of the written notice, by which the dissolved corporation must receive the claim; and

(4) state that the claim will be barred if not received by the deadline.

(c) A claim against the dissolved corporation is barred:

(1) if a claimant who was given written notice under subsection (b) does not deliver the claim to the dissolved corporation by the deadline;

(2) if a claimant whose claim was rejected by the dissolved corporation does not commence a proceeding to enforce the claim within 90 days from the effective date of the rejection notice.

Under these RMA provisions, a dissolving corporation can effectively entirely bar the claims of creditors who have been notified of the dissolution under RMA § 14.06(b) but have not responded in the manner prescribed in RMA § 14.06(c). In other words, once a dissolving corporation complies with the prescribed notice requirements, the RMA places the burden on notified creditors to submit their claims within the specified time periods or have them be forever and completely barred.

The Commission considered these provisions unduly harsh to the known creditors of a dissolving corporation and recommended the significantly greater protection of such creditors established by section 6. First, subsection (a) requires the corporation to specify the amount that it believes will satisfy the claim. Under subsection (d), the creditor is permitted to dispute the amount and, if he receives a rejection notice from the corporation, to commence judicial proceedings within 90 days of receipt of that notice. But his failure to take either of these steps will not (as would his failure to respond under the RMA rules) result in forfeiture of the entire claim, since subsection (e) still requires the corporation to pay the amount stated in its claim notice. Thus, under the BCL, a creditor's non-compliance with the section's procedures puts at risk only the amount he claims in excess of the corporation's acknowledged indebtedness, not the entire claim.

Moreover, regardless of whether a creditor disputes the amount of the claim, the BCL requires that payment of the corporation's acknowledged indebtedness be made promptly. If no timely dispute is filed by the creditor (or if the corporation rejects the additional claim and the creditor does not commence judicial proceedings within 90 days), subsection (d) "fixes" the amount of the claim at the amount stated in the corporation's initial notice and subsection (e) requires payment of that amount within 30 days after it became "fixed." If the creditor does initiate timely judicial proceedings after receiving a notice rejecting his dispute, subsection (e) still requires payment, within 30 days of the commencement of such proceedings, of the amount that is concededly due.

The BCL does, however, shorten the time during which the creditor must respond to the dissolving corporation's notice from the 120 days specified in RMA § 14.06(b)(3) to the 60-day period prescribed by subsection (b)(4). Particularly, since the BCL (unlike the RMA) requires the corporation to specify the amount it believes will satisfy the claim, the Commission believed 60 days was ample time for a creditor to determine whether to dispute the corporation's statement of that amount.

The GCA's claim notice procedures for a dissolving corporation were considerably less formal and elaborate than those of either the RMA or BCL. IC 23-1-7-1 (repealed 1986) simply instructed the corporation to notify its creditors of the proposed dissolution, publish notice in a local newspaper, pay and discharge all corporate debts and liabilities, and include a statement in its articles of dissolution that all debts and liabilities had been paid or that adequate provision for such payment had been made therefor. IC 23-1-7-1(e)(1) (repealed 1986) provided that no action could be commenced against the corporation after two years from the date of its dissolution.

These principles do not lengthen statutes of limitation applicable under state law. Thus, claims that are not barred under the foregoing rules – for example, if the corporation does not act on a claim – will nevertheless be subject to the general statute of limitations applicable to claims of that type.

23-1-45-7 Official comments

Subsections (b)(3) and (c) establish a two-year statute of limitations for claims to which notice is given under section 7, rather than the five-year limitations period provided in RMA § 14.07(b)(3) and (c).

The claim period under the Model Business Corporation Act is three years. See MODEL BUSINESS CORP. ACT § 14.07 (2003). The RMA's lengthy limitations period reflects a concern that contingent claims might arise long after dissolution is completed and the dissolving corporation's remaining assets have been distributed to its shareholders. *See* MODEL BUSINESS CORP. ACT § 14.07 (1985). The Commission believed, however, that the RMA gives insufficient weight to the countervailing concern of exposing directors, officers and shareholders of the dissolving corporation to uncertain liability for a protracted period. Accordingly, the Commission recommended retaining the two-year limitations period of the GCA, *see* IC 23-1-7-1(e)(1) (repealed 1986), as striking a more reasonable balance between these conflicting concerns.

If the dissolving corporation takes advantage of IC 23-1-45-6's optional procedure for disposing of known claims, this two-year limitations rule will apply only to unknown or contingent claims; if not, it will apply to all claims. The two-year statute of limitations established by the GCA, which had no special procedure for earlier disposition of known claims, applied to all claims against a dissolving corporation. *See* IC 23-1-7-1(e)(1) (repealed 1986).

23-1-47-1 Official comments

Because IC 23-1-47-2 establishes the proper venue for an action seeking judicial dissolution of a corporation (and designates Marion County as the proper venue for a proceeding initiated by the Attorney General), the introductory clause of section 1 deletes the RMA words "of the county in which the principal office of the corporation, or if none in this state, its registered office, is located" following the words "[t]he circuit or superior court."

Subsection (1)

Subsection (1) preserves the authority of the Secretary of State to seek to involuntarily dissolve a corporation by judicial decree. This right provides a means by which the state may ensure compliance with, and non-abuse of, the fundamentals of corporate existence. Subsection (1) limits the Secretary of State's power in this regard to grounds that are reasonably related to this objective.

Subsection (2)

Subsection (2), which sets forth the grounds for judicial dissolution in an action commenced by a shareholder, deletes the grounds specified in RMA 14.30(2)(ii) & (iv), which authorize a court to dissolve a corporation if the shareholder establishes that:

> (ii) the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent; [or]...
> (iv) the corporate assets are being misapplied or wasted[.]

The Commission recommended deleting these RMA provisions to protect corporations against "strike suits"--including those that might be filed during a hostile takeover battle--seeking dissolution on the grounds of alleged illegality, oppressiveness, fraud or waste of corporate assets. The Commission believed that derivative proceedings under IC 23-1-32 provide sufficient remedies for such conduct (if proven) and that authorizing the drastic step of judicial dissolution as an additional permitted remedy was inappropriate.

Subsection (3)

Creditors may obtain involuntary dissolution only when the corporation is insolvent and only in the limited circumstances set forth in subsection (3). Typically, a proceeding under the federal Bankruptcy Act is an alternative in this situation.

Subsection (4)

A corporation that has commenced voluntary dissolution may petition a court to supervise its dissolution. Such an action may be appropriate to permit the orderly liquidation of the corporate assets and to protect the corporation from a multitude of creditors' suits or suits by dissatisfied shareholders.

23-1-47-4 Official comments

A court decree ordering that a corporation be dissolved involuntarily has the same legal effect as filing articles of dissolution under IC 23-1-45-3. This section requires that the Secretary of State receive and file a copy of the decree.

23-1-48-1 Official comments

No separate BCL Official Comment.

23-1-49-1 Official comments

(a) Because the BCL does not attempt to provide an affirmative definition of what activities will constitute "transacting business" in Indiana, subsection (a) must be read in conjunction with subsection (b), which provides a non-exhaustive list of foreign corporation activities in Indiana that do *not* constitute "transacting business" in the State. In general, however, as explained in the RMA Official Comments, any conduct more regular, systematic or extensive than the type of activities described in subsection (b) will constitute the transaction of business and require a foreign corporation to obtain a certificate of authority. *See* MODEL BUSINESS CORP. ACT ANN. § 15.01 (3d ed. 1985).

The BCL's "transacting business" rules are relevant only with respect to the question [of] whether a certificate of authority must be obtained. They are specifically not applicable to the question [of] whether a corporation is liable for Indiana state taxes, or amenable to service of process in Indiana under IND. TR. R. 4.4.

The second sentence of subsection (a) was added in 1988 to clarify that foreign banking, surety, trust, safe deposit, railroad, insurance, and building and loan corporations, all of which are governed by special statutes, are not required to obtain certificates of authority under the BCL.

(b) Subsection (b) was amended in 1987 to add the words "or within the meaning of IC 27-1-27-1 or IC 28-1-22-1" at the end of the introductory clause, to clarify that the subsection's non-exhaustive list of activities that do not constitute "transacting business" for foreign corporations under the BCL also do not constitute "transacting business" in Indiana for foreign insurance companies and financial institutions, respectively, under the two cross-referenced statutes.

Also in 1987, the words "[m]aking loans or otherwise" were added to subsection (b)(7) to state expressly that making loans, as well as other activities associated with "creating or acquiring indebtedness, mortgages, and security interests," also does not by itself constitute "transacting business" in Indiana. Unlike the corresponding RMA provision, which the RMA Official Comments indicate applies only to foreign corporations that are "not in the business of making loans," *see* MODEL BUSINESS CORP. ACT ANN. § 15.01(b) (3d ed. 1985), subsection (b)(7)'s exclusion applies to *all* foreign corporations, including those in the business of making loans. This deliberate departure from the RMA is intended to encourage the making of loans in Indiana by foreign entities (including insurance companies and financial institutions) without requiring such entities to obtain a certificate of authority under the BCL or comparable authority under IC 27-1-17-1 or IC 28-1-22-1.

The GCA, in IC 23-1-11-1.5 (repealed 1986), provided that the acquisition of indebtedness in Indiana under certain specified circumstances did not constitute "transacting business" in the State. Given the broader and more general exclusion now established by subsection (b)(7), there was no need to retain the special rules of this GCA provision.

23-1-49-2 Official comments

(d) The Commission rejected the RMA's formula for imposition of civil penalties on foreign corporations that fail to obtain a required certificate of authority, which provide for *per diem* penalties up to a maximum annual limit. Instead, the Commission recommended retaining the maximum $10,000 penalty established by the GCA, *see* IC 23-1-11-14(a) (repealed 1986), to give the Attorney General maximum flexibility either in fixing the amount of or waiving entirely the penalty, especially in cases of inadvertent violations.

The BCL does not retain, however, the GCA rule, *see* IC 23-1-11-14(c) (repealed 1986), that unauthorized transaction of business can constitute a criminal offense. This is consistent with the Commission's general recommendation to "decriminalize" violations of corporate law requirements. *See* IC 23-1-18-10 and Official Comment.

(e) Subsection (e)'s rule that a foreign corporation's failure to obtain a certificate of authority "does not impair the validity of its corporate acts" is consistent with prior Indiana caselaw. *See, e.g., Peter & Burghard Stone Co. v. Carper*, 172 N.E. 319 (1930). For example, a contract entered into by a foreign corporation before obtaining a certificate of authority is not void. Similarly, a foreign corporation that has failed to obtain a certificate of authority may still defend any proceeding in Indiana. Under subsection (c), however, an Indiana proceeding commenced by a foreign corporation may be stayed until the court determines whether the corporation is required to obtain a certificate of authority and, if so, the proceeding may be further stayed until such a certificate is obtained.

23-1-49-3 Official comments

IC 23-1-49-1's rule that a foreign corporation may not transact business in Indiana until it obtains a certificate of authority does not mean that a foreign corporation that has failed to comply with that requirement may not attempt to rectify the situation by filing an application for such a certificate under section 3. An application under section 3 may be submitted at any time, even after a foreign corporation has commenced "transacting business" in Indiana. *See* IC 23-1-49-2(e) and Official Comment. Whether imposition of penalties is appropriate with respect to any period of non-compliance with IC 23-1-49-1 will depend on the circumstances and the discretion of the Attorney General and the court under IC 23-1-49-2.

23-1-49-6 Official comments

See IC 23-1-23-3 and Official Comment concerning the applicability to foreign corporations of the BCL's general corporate name provisions.

23-1-49-10 Official comments

(b) The language "or other executive officer as that term is used in Trial Rule 4.6(a)(1)" was added to this subsection to specify additional permitted addressees for service of process, because the Commission believed the BCL's provisions in this area should be consistent with those of the Indiana Rules of Procedure. The identical change, for identical reasons, was made in IC 23-1-24-4, and the service of process rules of the Indiana Rules of Procedure are discussed in the Official Comment to that section.

(d) Subsection (d) tracks the language of the RMA. However, the discussion in the Official Comment to IC 23-1-24-4(c) of the interrelationship between the service of process rules of that section and those of the Indiana Rules of Procedure applies with equal force to subsection (d) here.

23-1-50-1 Official comments

No separate BCL Official Comment.

23-1-52-1 Official comments

(e) (3) Subsection (e)(3) substitutes the words "with respect to" for the RMA word "creating," because the board resolutions to which the subsection refers do not "create" classes of shares (though they may "create" series within a class). *See* IC 23-1-25-2(d) and Official Comment.

23-1-52-2 Official comments

In general, the BCL's provisions with respect to shareholder inspection rights are more specific and detailed than those of the GCA.

(b) The GCA specified no prior notice period for shareholder demands to inspect and copy general corporate records, *see* IC 23-1-2-14 (repealed 1986), though it did require that a shareholder list be available for inspection for "five days" prior to a meeting for election of directors, *see* IC 23-1-2-9(h). *See also* IC 23-1-30-1(b) (repealed 1986) and Official Comment.

(c) The GCA permitted a shareholder to inspect and copy general corporate records for all "proper purposes." IC 23-1-2-14 (repealed 1986). While subsection (c) retains the "proper purpose" standard, it also requires that the shareholder describe "with reasonable particularity" both his purpose and the records he desires to inspect and copy. In addition, the described records must in fact be "directly connected with the shareholder's purpose."

23-1-54-1 Official comments [Repealed.]

In 1987, section 1's provisions concerning corporate authority to use "treasury shares," not found in the RMA, were reworded and recodified at IC 23-1-27-2(d), and section 1 was repealed. *See* IC 23-1-27-2(d) and Official Comment.

23-1-54-3 Official comments

Section 3, added in 1988, created the Indiana Corporate Law Survey Commission (now, the Indiana Business Law Survey Commission), (the "Survey Commission") as a permanent voluntary body to make recommendations to the General Assembly on future amendments to the BCL, the Indiana Not-For-Profit Corporation Act of 1971 (IC 23-7-1.1) (now repealed, and replaced by the Indiana Nonprofit Corporation Act of 1991, as amended (IC 23-17)) and other laws affecting business entities, as well as proposals for new legislation in these areas.

The new Survey Commission's predecessor was the Corporation Survey Commission, created in 1927 (H. CON. RES. 1-1927, 1927 Ind. Acts ch. 266), reauthorized in 1929 (H. CON. RES. 6-1929, 1929 Ind. Acts ch. 236) and made permanent in 1935 (H. CON. RES. 7-1935, 1935 Ind. Acts ch. 336) to examine Indiana's corporation and related laws and make recommendations to the General Assembly on corporate and business legislation that would best meet Indiana's commercial needs. The old Survey Commission prepared the Indiana General Corporation Act of 1929 and the General Not-For-Profit Corporation Act of 1935, monitored corporate practice trends and periodically recommended changes to these and other statutes.

The former Corporation Survey Commission was abolished effective June 30, 1988 by "sunset" legislation adopted in the 1988 session of the General Assembly (IND. P.L. 31-1988, § 1). At the same time, however, the new Survey Commission was created and codified as part of the BCL, to establish a permanent voluntary body to monitor the BCL and other business statutes and advise the General Assembly on amendments and new legislation to keep Indiana's corporate and related laws "state of the art." Creation of the new Survey Commission was specifically recommended by the General Corporation Law Study Commission (which prepared the BCL and the BCL Official Comments), in part because the Study Commission's own work was completed, and its existence terminated, on publication of these Official Comments.

The Survey Commission comprises 14 members appointed by the Governor (who serve without compensation or expense reimbursement), plus the Secretary of State, who serves *ex officio*. (This represents an expansion from the 9-member size of the old Corporation Survey Commission, both to allow greater participation and to spread the new Survey Commission's voluntary tasks among a larger group.) The Survey Commission is authorized to adopt rules for conducting its proceedings and affairs.

Under IND. P.L. 145-1988, § 10 (not codified in the BCL), the Governor's initial appointments to the Survey Commission included the persons who were members of the predecessor Corporation Survey Commission on June 30, 1988, thereby ensuring some continuity in the operations of the former and the new Survey Commissions.